80-609

No. .....

Supreme Court, U. S.
FILED
OCT 14 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

October Term, 1980

JOAN M. JOHNSON,
Petitioner,

vs.

NORDSTROM-LARPENTEUR AGENCY, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Does section 703(a)(1) of Title VII, 42 U.S.C. § 2000e-2(a)(1), which prohibits discrimination in compensation on the basis of sex, incorporate the "equal pay for equal work" and "separate establishment" standards of section 6(d) of the Equal Pay Act of 1963, 29 U.S.C. § 206(d), which concerns sex discrimination in compensation, so that a plaintiff cannot recover under Title VII unless she could recover under section 6(d) of the Equal Pay Act, or is Title VII broader than the Equal Pay Act so that even if a plaintiff's job was not substantially equal to the job of a male worker in the same or a different establishment, she should still be allowed to prove that the discrepancy in compensation was due to sex discrimination?

2. Are geographically separate offices of the same employer separate establishments for the purpose of section 6(d)(1) of the Equal Pay Act, 29 U.S.C. § 206(d)(1), although the same functions are performed in each office, and some personnel in one office have identical duties to some personnel in the other office?

3. Did the United States District Court for the District of Minnesota, and the United States Court of Appeals for the Eighth Circuit, err in refusing to allow plaintiff her costs under 42 U.S.C. § 2000e-5(k)?

PARTIES

All parties to this proceeding are listed in the caption.

TABLE OF CONTENTS

Questions Presented 1

Opinions Below 1

Jurisdiction 2

Statutes, Regulation, and Rule Involved 2

Statement of the Case 3

- Nature of the Case 3
- Evidence 4
- Rulings Below 7

Reasons for Granting the Writ 10

I. Does Section 703(a)(1) of Title VII, 42 U.S.C. § 2000e-2(a)(1), Which Prohibits Discrimination in Compensation, on the Basis of Sex, Incorporate the "Equal Pay for Equal Work" and "Separate Eestablishment" Standards of Section 6(d) of the Equal Pay Act of 1963, 29 U.S.C. § 206(d), Which Concerns Sex Discrimination in Compensation, So That a Plaintiff Cannot Recover Under Title VII Unless She Could Recover Under Section 6(d) of the Equal Pay Act, or Is Title VII Broader Than the Equal Pay Act So That Even If a Plaintiff's Job Was Not Substantially Equal to the Job of a Male Worker in the Same or a Different Eestablishment, She Should Still Be Allowed to Prove That the Discrepancy in Compensation Was Due to Sex Discrimination? 10

II. Are Geographically Separate Offices of the Same Employer Separate Establishments for the Purposes of Section 6(d)(1) of the Equal Pay Act, 29 U.S.C. § 206(d)(1), Although the

PREVIOUS PAGE WAS BLANK

Same Functions Are Performed in Each Office, and Some Personnel in One Office Have Identical Duties to Some Personnel in the Other Office? 20

III. Did the United States District Court for the District of Minnesota, and the United States Court of Appeals for the Eighth Circuit, Err in Refusing to Allow Petitioner Her Costs Under 42 U.S.C. § 2000e-5(k)? 24

Conclusion 27

Appendix A—Opinion, United States Court of Appeals, Eighth Circuit A1

Appendix B—Order Denying Rehearing A8

Appendix C—Opinion, United States District Court, District of Minnesota A9

Appendix D—Statutes, Regulation, and Rule Involved A35

Table of Authorities

Cases

A.H. Phillips, Inc. v. Walling, 324 U.S. 490 (1945) 23

Ammons v. Zia Company, 448 F.2d 117 (10th Cir. 1971) 13

Brennan v. Goose Creek Consolidated Independent School District, 519 F.2d 53 (5th Cir. 1975) 21, 24

Gillbreath v. Daniel Funeral Home, Inc., 421 F.2d 504 (8th Cir. 1970) 23

Gunther v. County of Washington, (Gunther I), 602 F.2d 882 (9th Cir. 1979), *rehearing denied*, No. 76-3448, 22 F.E.P. Cases 1650 (May 1, 1980) 14, 15, 16, 18, 19, 20

Gunther v. County of Washington, (Gunther II), No. 76-3448, 22 F.E.P. Cases 1650 (9th Cir. May 1, 1980), *denying rehearing*, 602 F.2d 882 (1979) 14, 16, 17, 18, 19, 20

Howard v. Ward County, 418 F. Supp. 494 (D. N.D. 1976) 13

International Union of Electrical, Radio & Machine Workers v. Westinghouse Electric Corporation, Nos. 79-1893, 79-1894, 23 F.E.P. Cases 588 (3d Cir. Aug. 1, 1980) 14, 16, 17, 18, 19, 20

Johnson v. Nordstrom-Larpenteur Agency, Inc., No. 4-76-Civ. 325, 23 F.E.P. Cases 274 (D. Minn. Aug. 9, 1979) 2, 22, 24

Johnson v. Nordstrom-Larpenteur Agency, Inc., 623 F.2d 1279 (8th Cir. June 13, 1980) 9, 25

Marshall v. Dallas Independent School District, 605 F.2d 191 (5th Cir. 1979) 21-22

Mitchell v. Gammill, 245 F.2d 207 (5th Cir. 1957) 23

Molthan v. Temple University, 442 F. Supp. 448 (E.D. Pa. 1977) 13

Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968) (per curiam) 26

New York v. Gaslight Club v. Carey, No. 79-192, 22 F.E.P. Cases 1642 (U.S. June 9, 1980) 26

Orr v. Frank R. MacNeill & Son, Inc., 511 F.2d 166 (5th Cir. 1975), *cert. denied*, 423 U.S. 865 13

Parker v. Califano, 443 F. Supp. 789 (D. D.C. 1978), *aff'd without discussion of issue*, 561 F.2d 320 (D.C. Cir. 1977) 25

Schultz v. Corning Glass Works, 319 F. Supp. 1161, (W.D. N.Y. 1970), *modified on different grounds sub nom., Hodgson v. Corning Glass Works*, 474 F.2d 226 (2d Cir. 1973), *aff'd sub nom., Corning Glass Works v. Brennan*, 417 U.S. 188 (1974) 22

Wetzel v. Liberty Mutual Insurance Co., 449 F. Supp. 397 (W.D. Pa. 1978) 13, 20

STATUTES

Civil Rights Act of 1964 (Title VII)

42 U.S.C. § 2000e(b), (f) 2, 3
42 U.S.C. § 2000e-2(a) 2, 7, 8
42 U.S.C. § 2000e-2(h) (Bennett Amendment) *passim*
42 U.S.C. § 2000e-5(f)(3), (g), (k) 2, 4, 24, 25

Fair Labor Standards Act

29 U.S.C. § 203(d), (e)(1) 2, 3
29 U.S.C. § 206(d)(1) (Equal Pay Act) ..... *passim*
29 U.S.C. § 213(a)(2) 2, 23

Judicial Sections

28 U.S.C. § 1254(1) 2
28 U.S.C. § 1291 2
28 U.S.C. § 1331(a) 3, 4
28 U.S.C. § 1343(a)(4) 3, 4
28 U.S.C. § 1920 ..... 3, 25

REGULATION

29 C.F.R. § 1604.8 (Equal Employment Opportunity Commission) 3, 19

MISCELLANEOUS

ABA Code of Professional Responsibility, Disciplinary Rule 5-103 (Missouri Supreme Court Rule 4, Canon 5, D.R. 5-103) 3, 25
110 Cong. Rec. 13647 (1964) 15
111 Cong. Rec. 13359 (1965) 16
S. Rep. No. 95-311, 95th Cong., 1st Sess. 7 (1977) 16

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JOAN M. JOHNSON,
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vs.

NORDSTROM-LARPENTEUR AGENCY, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Joan M. Johnson, the petitioner herein, prays that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled cause on June 13, 1980, rehearing denied, July 17, 1980.

OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the Eighth Circuit is reported at 623 F.2d 1279 (8th Cir. 1980), and is printed in Appendix A hereto, *infra,* A1. The Order for the United States Court of Appeals for the Eighth Circuit denying appellant's petition for rehearing and rejecting petitioner's suggestions for rehearing en banc is printed in Appendix B hereto, *infra,*

page A8. The findings of fact and conclusions of law and order for judgment of the United States District Court is reported at 23 F.E.P. Cases 274 (August 9, 1979) and is printed in Appendix C hereto, *infra*, page A9.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Eighth Circuit (Appendix A, *infra*, page A1) was entered on June 13, 1979. A timely petition for rehearing and suggestions for rehearing en banc were denied on July 17, 1980 (Appendix C, *infra*, page A9). The jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES, REGULATION, AND RULE INVOLVED

The statutes, regulation, and rule involved in this case, set forth verbatim in Appendix D, are as follows:

STATUTES

Civil Rights Act of 1964 (Title VII)

42 U.S.C. § 2000e(b), (f)

42 U.S.C. § 2000e-2(a)

42 U.S.C. § 2000e-2(h) (Bennett Amendment)

42 U.S.C. § 2000e-5(f)(3), (g), (k)

Fair Labor Standards Act

29 U.S.C. § 203(d), (e)(1)

29 U.S.C. § 206(d)(1) (Equal Pay Act)

29 U.S.C. § 213(a)(2)

Judicial Sections

28 U.S.C. § 1254(1)

28 U.S.C. § 1291

28 U.S.C. § 1331(a)
28 U.S.C. § 1343(a)(4)
28 U.S.C. § 1920

REGULATION

29 C.F.R. § 1604.8 (Equal Employment Opportunity Commission)

MISCELLANEOUS

ABA Code of Professional Responsibility, Disciplinary Rule 5-103 (Missouri Supreme Court Rule 4, Canon 5, D.R. 5-103)

STATEMENT OF THE CASE

Nature of the Case

Petitioner Joan M. Johnson is a female citizen of the United States residing in the State of Kansas. Petitioner was an employee within the meaning of § 701(b) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(b), and within the meaning of section 3(e)(1) of the Fair Labor Standards Act, 29 U.S.C. § 203(e)(1), during the relevant time period. Respondent Nordstrom-Larpenteur Agency, Inc. (the Agency) is a Delaware corporation with its principal place of business in Minneapolis, Minnesota. One of respondent's branch offices is located in Mission, Kansas (the Kansas City office). Respondent is an employer within the meaning of section 701(b) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(b), and within the meaning of tne Fair Labor Standards Act, 29 U.S.C. § 203(b). Petitioner began working for respondent in the Kansas City office on June 19, 1972 for $750.00 per month wages. Petitioner continued to work for respondent until her termination on April 10, 1975. On

August 22, 1975, petitioner filed a timely sex discrimination charge against respondent with the Equal Employment Opportunity Commission (EEOC) alleging that respondent discriminated against petitioner in wages, terms, and conditions of employment for doing the same work as the male Marketing Manager in the Kansas City office. On April 27, 1976, petitioner was notified by the EEOC of her right to sue respondent. Petitioner commenced an action against respondent in the United States District Court for the District of Minnesota on July 26, 1976. Jurisdiction of the District Court was conferred by 42 U.S.C. § 2000e-5(f)(3), 28 U.S.C. §§ 1331, 1343(4), and 29 U.S.C. § 206(d).

Evidence

Petitioner began working for respondent as a sales assistant. Her initial duties, however, involved assisting the Marketing Manager, Roy Wolfe. Respondent is an insurance company, which both sells insurance policies to clients and markets policies to insurance companies willing to take the risk. From June 19, 1972 until November 1974, Ms. Johnson worked alongside Mr. Wolfe performing essentially parallel marketing operations, although, unlike Mr. Wolfe, she made no out-of-town trips and did no marketing in branch offices. During this time petitioner also assisted a Mr. Higgins as a Sales Assistant. Petitioner was instrumental in the development of an agency relationship between respondent and two insurance companies. Joan Johnson aided Mr. Wolfe in placing new business and negotiating new markets. Mr. Wolfe serviced accounts outside the office, while Ms. Johnson serviced accounts in the office. Ms. Johnson engaged in the same marketing procedure as Mr. Wolfe regardless whether an out-of-town or an in-town marketing question was involved. Occasionally, Ms. Johnson and Mr. Wolfe would attempt to

market the same business. Both Ms. Johnson and Mr. Wolfe worked on national accounts.

Gregory Galvin, who had qualifications similar to those of Ms. Johnson, performed substantially the same work as Ms. Johnson in the Minneapolis office. He received a salary at the rate of $17,004 per year during 1973 and 1974.

In November 1974, Joan Johnson replaced Roy Wolfe as Marketing Manager. Mr. Wolfe's salary at that time was $20,800.00 per year plus $600.00 per year expenses. On November 6, 1974, Jim Higgins wrote to Glenn Pearson, an executive in the Minneapolis office, that Ms. Johnson would become the "marketing man." Mr. Higgins recommended a salary increase from Ms. Johnson's current rate of pay of $840.00 per month to $900.00 per month, although he stated that $900.00 per month was too much money to pay a "girl." Nevertheless, he wrote that Ms. Johnson could not be given the job, title, and responsibility of a Marketing Manager without the pay. On November 18, 1974, Glenn Pearson wrote to Mr. Higgins stating that Ms. Johnson should be informed that she would take over marketing on a probationary basis, and that if her work was satisfactory her salary would be increased. On November 25, 1974, Mr. Higgins wrote to Mr. Pearson informing him that delaying the raise in salary was a questionable procedure, and proposing that respondent pay Ms. Johnson $50.00 per month expenses in lieu of a raise. Mr. Pearson replied, on December 2, 1974, that he did not want to become involved with expense accounts for the "marketing girls." Instead, Mr. Pearson proposed that Joan Johnson's salary be increased to $900.00 per month effective December 15, 1974.

After November 1, 1974, Mr. Williams, the new regional marketing manager, took Ms. Johnson to five in-

surance companies, introducing her as Mr. Wolfe's replacement. Mr. Williams requested that Ms. Johnson be designated as an "M/R," marketing representative, the same title held by Gregory Galvin in Minneapolis. That classification request was denied by Mr. Williams' superiors.

Ms. Johnson took over all the marketing functions of the Kansas City office. She retained some of her duties as a sales assistant. She was to attend a training session in Minneapolis in order to become more productive, but this never occurred. Ms. Johnson was instructed that she would not be handling inter-branch matters. She handled inter-branch matters that continued to be referred to the Kansas City office, however. Diane Teresi, of the National Operations Department, while visiting the Kansas City office made no criticism of petitioner's work, made no recommendations to Ms. Johnson, and did not suggest any disciplinary measures be instituted against her. Ms. Johnson's repeated requests for assistance were denied. Ms. Johnson was denied the opportunity to attend the national marketing summer meeting, because only men attended this meeting. Ms. Johnson was not permitted to move into Mr. Wolfe's former office because it was thought to be too large for a woman. The Insurance Company of North America relied upon Joan Johnson's presence with respondent in placing its business with the Agency. Many of the dealings between the Great American Insurance Company and respondent were conducted by Ms. Johnson.

Ms. Johnson was terminated from her employment with Nordstrom-Larpenteur Agency on April 10, 1975. Purportedly, one of the reasons Ms. Johnson was terminated was her backlog of work, which twice left respondent open to potential losses as a result of failure to renew coverage of lapsing policies. Mr. Wolfe was not dis-

ciplined in any way for a similar mistake that had exposed the Agency to actual loss. Other employees were not criticized or disciplined for similar errors. There is no record in Joan Johnson's personnel file that she was ever disciplined nor was any disciplinary action ever instituted against her.

After Ms. Johnson's termination, Mr. Ed O'Malley was hired as an account executive and began doing all the marketing work previously performed by petitioner. Mr. O'Malley and Ms. Johnson had similar employment background and qualifications. Mr. O'Malley received a salary of $1,550.00 per month, an automobile allowance of $50.00 per month, and an expense allowance of $50.00 per month for his participation in marketing functions in May 1975.

Rulings Below

Ms. Johnson filed suit in this action seeking back pay and equitable relief from sex discrimination in compensation and other terms and conditions of her employment. Petitioner claimed Nordstrom-Larpenteur discriminated against her on the basis of sex by not paying her equal pay for equal work in violation of the Equal Pay Act of 1963, the Agency discriminated against her in compensation for work basically equal to that of male employees in violation of Title VII of the Civil Rights Act of 1964, and the Agency discriminated against her in terms and conditions of employment contrary to the mandate of Title VII. Petitioner alleged that respondent denied her equal employment opportunities in promotion, and that she was discharged solely due to her sex. Ms. Johnson prayed for all equitable relief available pursuant to 42 U.S.C. § 2000e-(2) in Count I of her Complaint. She claimed a willful violation of the Equal Pay Act under Count II, and sought relief thereunder including liquidated damages. She sought reasonable attorney's fees and costs in both Counts. Respondent coun-

terclaimed for $1,922.00 allegedly owed to the Agency by Ms. Johnson at the time of her termination.

The United States District Court for the District of Minnesota, Judge Larson presiding, found that petitioner was discriminated against by respondent regarding wages and promotion due to her sex from November 1, 1974 to April 10, 1975, in violation of section 703(a) of Title VII, 42 U.S.C. § 2000e-2(a). The court found that Ms. Johnson was entitled to $4,442.00 in damages for this violation. *Johnson v. Nordstrom-Larpenteur Agency, Inc.*, No. 4-76-Civ. 325, 23 F.E.P. Cases 274, 283 (D. Minn. Aug. 9, 1979) (Conclusion of Law ¶ 4). The court further found that petitioner did not perform work substantially equal to the work performed by Mr. Wolfe, that respondent had rebutted adequately allegations that the position held by Mr. O'Malley was substantially equal in skill, effort, and responsibility under similar working conditions. Therefore, the court found that petitioner was not discriminated against in violation of section 206(d) of the Equal Pay Act. *Id.* at 284 (Conclusion of Law ¶ 6).

The court further concluded that Ms. Johnson was liable to Nordstrom-Larpenteur Agency in the amount of $1,922.28 on respondent's counterclaim. *Id.* (Conclusions of Law ¶ 8). Since each party had prevailed on one of its claims, the court ordered each party to bear its own costs and attorney's fees. *Id.* (Order for Judgment ¶ 5).

The district court refused to consider whether Ms. Johnson's salary was unlawfully lower than that of Mr. Galvin, under either the Equal Pay Act or Title VII, finding that Mr. Galvin and Ms. Johnson worked in separate establishments. *Id.* at 279, 283 (Findings of Fact ¶ 23, Conclusions of Law ¶ 1). The district court also refused to consider whether or not Title VII is broader than the Equal Pay Act so that petitioner could prove that her low

wages resulted from sex discrimination even though no male employee performed substantially equal work in Kansas City, although Ms. Johnson alleged that Mr. Galvin in Minneapolis did perform substantially equal work.

The United States Court of Appeals for the Eighth Circuit upheld the district court's judgment in all but one particular. *Johnson v. Nordstrom-Larpenteur Agency, Inc.*, 623 F.2d 1279 (8th Cir. June 13, 1980). By implication, the Court of Appeals affirmed the district court's ruling that Galvin and Johnson worked in separate establishments, and found the scope of Title VII to be the same as the scope of the Equal Pay Act. The Court of Appeals did hold that the district court erred in denying Ms. Johnson recovery of her attorney's fees as part of the costs. *Id.* at 1281-82. The Court of Appeals denied petitioner a rehearing and rejected her suggestions for a rehearing en banc on July 17, 1980.

REASONS FOR GRANTING WRIT

I. Does Section 703(a)(1) of Title VII, 42 U.S.C. § 2000e-2(a)(1), Which Prohibits Discrimination in Compensation on the Basis of Sex, Incorporate the "Equal Pay for Equal Work" and "Separate Establishment" Standards of Section 6(d) of the Equal Pay Act of 1963, 29 U.S.C. § 206(d), Which Concerns Sex Discrimination in Compensation, So That a Plaintiff Cannot Recover Under Title VII Unless She Could Recover Under Section 6(d) of the Equal Pay Act, or Is Title VII Broader Than the Equal Pay Act, So That Even If a Plaintiff's Job Was Not Substantially Equal to the Job of a Male Worker in the Same or a Different Establishment, She Should Still Be Allowed to Prove That the Discrepancy in Compensation Was Due to Sex Discrimination?

Important reasons warrant that the United States Supreme Court decide the question presented, as it involves the considerations set forth in Supreme Court Rule 17. First, the Fifth, Eighth, and Tenth Circuit Courts of Appeals have reached a different conclusion in considering this question than the Third and Ninth Circuit Courts of Appeals. Second, the question presented involves an important question of federal law that should be settled by the Supreme Court of the United States. Simply stated, "[t]he statutory issue here is whether Congress intended to permit [respondent] to wilfully discriminate against women in a way in which it could not discriminate against blacks or whites, Jews or Gentiles, Protestants or Catholics, Italians or Irishmen, or any other group protected by the [Civil Rights] Act." *International Union of Electrical, Radio & Machine Workers v. Westinghouse Electric Corporation*, Nos. 79-1893, 79-1894, 23 F.E.P. Cases 588, 590 (3d Cir. Aug. 1, 1980).

The United States District Court for the District of Minnesota found that Joan Johnson's duties did not involve the same skill, effort, or responsibility as the duties of Roy Wolfe or Ed O'Malley, and did not consider the question whether Gregory Galvin and Ms. Johnson did basically equal work. These inequivalencies prevented Ms. Johnson from prevailing on her Equal Pay Act claim. Nonetheless, Ms. Johnson was allowed recovery for back pay for the time she was considered to be a replacement for Roy Wolfe. See *Johnson,* 23 F.E.P. Cases 279 (Findings of Fact ¶ 24). It is unclear whether the court permitted recovery for the period November 1, 1974 to April 10, 1975 because it found that the company considered the positions held by Joan Johnson and Roy Wolfe to be substantially equal, or because the company had demonstrated that it had discriminated in paying wages against petitioner on the basis of her sex. If the district court took the former approach then it apparently found Title VII to be coextensive with the Equal Pay Act, so that the acts constituting the Title VII violation also constituted an Equal Pay Act violation. The court specifically held that respondent's acts did not run afoul of the Equal Pay Act, however. *Id.* If the district court meant that Title VII is broader than the Equal Pay Act so that Ms. Johnson could recover even though she had not proved a violation of the Equal Pay Act, then Ms. Johnson should also have recovered back pay from the beginning of her employment with Nordstrom-Larpenteur Agency, as she proved that the Agency believed that women should be paid less than men whether or not men and women performed basically similar work. See *id.* at 279-80 (Findings of Fact ¶ 18). Because the court specifically found that plaintiff was considered by defendant to be a probationary replacement for Roy Wolfe, *id.* at 279 (Findings of Fact ¶ 24), it must have found a Title VII violation based on respon-

dent's treatment of the two jobs as similar. The court's position makes sense only if the court found no Equal Pay Act violation occurred as a result of acts that constituted a violation of Title VII because the two jobs were not *in fact* substantially equal despite respondent's treatment of the jobs as equal. Because the court awarded petitioner back pay consisting of the difference between her salary and Mr. Wolfe's salary, the court must have assumed that the two positions involved basically equal skills and responsibilities for purposes of Title VII. Although there is no "same establishment" criterion in Title VII the district court did not compare the work and pay of Mr. Galvin of Minneapolis and Ms. Johnson to determine whether the discrepancy in pay between the two was a result of sex discrimination.

The United States Court of Appeals for the Eighth Circuit, in affirming the district court's decision on all issues save that of attorney's fees, approved without discussion the apparent legal conclusion of the district court that because of the Bennett Amendment, which protects employers from a Title VII violation if the employer's conduct is "authorized" by the affirmative defenses of the Equal Pay Act, a Title VII violation does not exist unless the facts would also support a claim of violation of the "equal pay for equal work" formula of the Equal Pay Act. The Eighth Circuit also implicitly upheld the district court's refusal to compare the wages of Mr. Galvin and Ms. Johnson to determine whether Title VII was violated by the discrepancy in pay.

Other courts have explicitly stated that the Bennett Amendment limits sex-based wage discrimination claims under Title VII to that conduct that would sustain finding a violation of the Equal Pay Act as well. These courts incorporate the "substantially equal" requirement for relief

under the Equal Pay Act into Title VII. See *Orr v. Frank R. MacNeill & Son, Inc.*, 511 F.2d 166, 171 (5th Cir. 1975), *cert. denied*, 423 U.S. 865; *Ammons v. Zia Company*, 448 F.2d 117, 120 (10th Cir. 1971); *Wetzel v. Liberty Mutual Insurance Co.*, 449 F. Supp. 397, 400-01 (W.D. Pa. 1978) (located in the Third Circuit). Cf. *Howard v. Ward County*, 418 F. Supp. 494, 503, 505 (D. N.D. 1976) (located in Eighth Circuit) (reasoning that Equal Pay Act standards determine whether Title VII violation exists, but acknowledging that Title VII prohibitions against sex-based wage discrimination may be broader than Equal Pay Act prohibitions). In *Orr v. Frank R. MacNeill & Son, Inc.*, 511 F.2d 166, 171 (5th Cir. 1975), *cert. denied*, 423 U.S. 865, the Fifth Circuit declared that "[t]o establish a case under Title VII it must be proved that a wage differential was based upon sex and that there was a performance of equal work for unequal compensation." Accord *Ammons v. Zia Company*, 448 F.2d 117, 120 (10th Cir. 1971); *Molthan v. Temple University*, 442 F. Supp. 448, 455 (E.D. Pa. 1977).

To these tribunals, no wage discrimination violation of Title VII can be predicated upon facts demonstrating that a female employee's salary has been determined by the employer on the basis of sex unless there is a male employee doing substantially equal work for higher wages. See, e.g., *Wetzel v. Liberty Mutual Insurance Co.*, 449 F. Supp. 397, 400-01 (W.D. Pa. 1978) (finding "substantially equal" jobs); *Molthan v. Temple University*, 442 F. Supp. 448, 450-51 & n.1 (E.D. Pa. 1977). In essence, this analysis of Title VII prevents female workers from making claims for relief even if their wages are set lower than the employer would compensate male workers due to the employer's belief that women are inferior to men. Business persons could discriminate in the payment of wages by

the simple expedient of hiring only persons of one sex for a particular job.

The Third and Ninth Circuits have split sharply from the approach taken by the Fifth, Eighth, and Tenth Circuit Courts of Appeals, and the decisions of the district courts located in the Third and Eighth Circuits. Petitioner respectfully submits that better reasoning is exhibited by the Ninth Circuit in *Gunther v. County of Washington*, 602 F.2d 882 (9th Cir. 1979) (*Gunther I*), *rehearing denied*, No. 76-3448, 22 F.E.P. Cases 1650 (May 1, 1980) (*Gunther II*), and the Third Circuit in *International Union of Electrical, Radio & Machine Workers v. Westinghouse Electric Corporation*, Nos. 79-1893, 79-1894, 23 F.E.P. Cases 588 (3d Cir. Aug. 1, 1980).

In *Gunther I*, four former jail matrons sued the County of Washington and certain law enforcement officials under Title VII alleging, *inter alia*, that even if their work was not substantially equal to that of male guards, some of the discrepancy in salary could only be attributed to sex discrimination. Consequently, plaintiffs could not recover if Title VII were coextensive with the Equal Pay Act. *Gunther I*, 602 F.2d at 886 n.4. The court found that Title VII offered relief to plaintiffs despite the fact that no male coworker performed substantially equal work. Therefore, the court of appeals remanded the case to the district court to afford plaintiffs the opportunity to prove sex discrimination in compensation apart from an equal pay claim. The Third Circuit Court of Appeals used the same rationale in *International Union*, in which plaintiffs alleged that defendant deliberately set wage rates lower for those job classifications that were predominantly filled by females than the wage rates for job classifications predominantly filled by males. The reasoning of the courts in *Gunther I*, *Gunther II*, and *International Union*, should

persuade the Supreme Court that Title VII is broader in scope than the Equal Pay Act.

Title VII contains broad language. *Gunther I*, 602 F.2d at 889. The Equal Pay Act is silent regarding sex discrimination in employment other than wage discrimination. Title VII, on the other hand, prohibits sexual discrimination in hiring, promotion, and terms and conditions of employment, as well as in compensation. Title VII proscribes conduct that adversely affects a person's status as an employee on the basis of sex. A great many discriminatory practices, including low wages based merely on the sex of the worker, are subsumed by the phrase "adversely affects." Under Title VII a court can compare the wages of workers in separate establishments, while under the Equal Pay Act, the court can only compare the wages of workers in the same establishment.

While the Bennett Amendment can be construed to incorporate the Equal Pay Act's equal work formula into Title VII, it more properly should be interpreted as incorporating only the four affirmative defenses of the Equal Pay Act into Title VII. The legislative history of the Bennett Amendment supports the proposition that the Equal Pay Act is not coextensive with Title VII. See *Gunther I*, 602 F.2d at 889. True, while Title VII was being considered on the floor of the Senate, Senator Bennett and Senator Humphrey both seemed to think the Amendment's purpose was "to provide that in the event of conflicts, the provisions of the Equal Pay Act shall not be nullified." 110 Cong. Rec. 13647 (1964). Only seconds later, however, Senator Dirksen recognized the broader scope of Title VII when he stated: The Fair Labor Standards Act carries out certain exceptions. *All that the pending amendment does is recognize those exceptions, that are carried in the basic act.*"

Id. (emphasis added). Neither Senator Bennett nor Senator Humphrey objected to this declaration. See *Gunther I*, 602 F.2d at 889-90 & n.8; *International Union*, 23 F.E.P. Cases at 594-95. Moreover, Senator Humphrey's comments were found by the Ninth Circuit to reflect an erroneous interpretation of the Equal Pay Act. This determination was not refuted by the Supreme Court when it had an opportunity to do so. *Manhart v. City of Los Angeles*, 553 F.2d 581, 590 (9th Cir. 1976), *aff'd in relevant part and vacated & remanded on other grounds*, 435 U.S. 702 (1978). One year after the Civil Rights Act was passed, Senator Bennett inserted a memorandum in the *Congressional Record*. This memorandum stated that the Bennett Amendment meant a Title VII sex discrimination claim could not be predicated upon practices that did not also violate the Equal Pay Act. 111 Cong. Rec. 13359 (1965). This statement is entitled to no consideration in determining congressional intent at the time the provision was enacted. *Gunther II*, 22 F.E.P. Cases at 1652; *International Union*, 23 F.E.P. Cases at 595. If later pronouncements are to be given weight, equal deference is due the 1977 Senate Report on amendments to Title VII, which stated: "It is the committee's opinion that [an] application of the Bennett amendment which assumes that the provision insulates from Title VII all compensation and fringe benefit programs that do not also violate the Equal Pay Act is not correct." S. Rep. No. 95-311, 95th Cong., 1st Sess. 7 (1977). To the potential argument that Congress did not want the courts to become involved in job evaluation trials for women, it is sufficient to respond that Congress was willing to countenance job evaluation trials for racial, religious, and national origin discrimination. *International Union*, 23 F.E.P. Cases at 593.

The fact that the first sentence of section 703(h) of Title VII contains three of the defenses authorized by

the Equal Pay Act does not render the Bennett Amendment meaningless if it is construed to incorporate only the Equal Pay Act defenses into Title VII. *International Union,* 23 F.E.P. Cases at 593; *Gunther II,* 22 F.E.P. Cases at 1652-53. The incorporation of the additional defense allowing discrepancies in wages based "on any other factor other than sex" establishes that the burden is on the employer to prove its conduct falls within the purview of one of the four defenses. *Gunther II,* 22 F.E.P. Cases 1652-53. The differences between Title VII and the Equal Pay Act should not be ignored. Moreover, if a statute contains a specific provision, the omission of that provision from another statute on the same topic indicates the legislature did not intend that provision to be considered when it enacted the latter statute. *International Union,* 23 F.E.P. Cases at 593.

The remedial character of Title VII lends credence to the suggestion that it should not be limited to the terms of the Equal Pay Act in the absence of clear congressional intent to that effect. Indeed, it is difficult to perceive the purpose of enacting two statutes prohibiting wage discrimination on the basis of sex if both statutes proscribe the same conduct. Title VII was intended to supplement rather than supplant existing legislation prohibiting sex discrimination against women. See *Laffey v. Northwest Airlines, Inc.,* 567 F.2d 429, 445-46 (D.C. Cir. 1976), *cert. denied,* 434 U.S. 1086 (1978).

As the Courts of Appeals for the Third and Ninth Circuits noted, to limit the prohibitions against sex discrimination in wages in Title VII to those practices condemned in the Equal Pay Act would lead to absurd results. Under the Equal Pay Act, an employer can pay a female worker substantially less than he would pay a male worker for the same work, or decrease the wages of women solely

on account of their sex, all for the lack of a male counterpart performing virtually identical work in the same establishment. If Nordstrom-Larpenteur paid one type of employee less than another type because the first group was composed mostly of Catholics and the latter of Protestants, it would clearly be in violation of Title VII. Title VII and the Bennett Amendment should not be construed to permit like wage disparity because the majority of persons employed in one group are women. *International Union,* 23 F.E.P. Cases at 592; *Gunther I,* 602 F.2d at 890 n.9.

Acknowledging the broad scope of Title VII will not lead to results inconsistent with those obtained pursuant to the Equal Pay Act. "When plaintiffs raise a claim under Title VII of discriminatory compensation in the absence of an allegation that they perform substantially equal work, no conflict with the Equal Pay Act arises because the Equal Pay Act is inapplicable." *Gunther I,* 602 F.2d at 891.

The very language of the Bennett Amendment, which provides that wage differentials are permissible if "authorized" under the Equal Pay Act, implies that the Equal Pay Act defenses are permitted or endorsed. It does not suggest that something is not prohibited. *International Union,* 23 F.E.P. Cases at 593; *Gunther II,* 22 F.E.P. Cases at 1652. Had Congress meant that Title VII is violated only when the relevant facts also comprise an Equal Pay Act violation, it could have said precisely that. *Gunther II,* 22 F.E.P. Cases at 1653. After all, the Equal Pay Act had only been passed the previous year. The members of Congress presumably remembered how to draft a statute containing an "equal pay-equal work" formula.

Finally, the governmental agency charged with enforcement of the Civil Rights Act, the Equal Employment Opportunity Commission, makes it quite clear that it con-

strues the Bennett Amendment to mean that Title VII is not limited to employees covered by the Equal Pay Act. 29 C.F.R. § 1604.8(a) (1979). The EEOC decided a number of cases prior to 1972 that found Title VII governed situations in which wage rates for jobs traditionally dominated by women were lower than the rates for jobs predominantly held by men. The EEOC's position is entitled to great deference. *International Union*, 23 F.E.P. Cases at 597.

The confusion caused by the Bennett Amendment demonstrates that a decision from the Supreme Court of the United States is urgently needed to resolve the split in the courts of appeals over the question of the scope of Title VII. The considerations that led to the courts' decisions in *Gunther* and *International Union* also mandate that the Supreme Court pass upon this important question of federal law. Basic and fundamental rights are at stake. The Congress of the United States has evinced its intention through the Equal Pay Act and Title VII that women's wages not be set solely on the basis of their sex. These statutes were designed to remedy the wrongs done to women economically and socially because of the mistaken notion of women's inferiority in the work force. If the dreams of Congress for a society in which people are compensated according to their individual worth instead of stereotyped notions about their sex are to be fulfilled, it is necessary that this Court declare that Title VII should be given the scope intended by Congress. It is paramount that the Supreme Court decide the crucial federal question whether Title VII is broader in scope than the Equal Pay Act, so that a woman can receive redress if her wages are set because of her sex, regardless of whether a male in the establishment performs "substantially equal" work.

The reasoning in the *Gunther* cases and *International Union*, and the argument above that Title VII is broader in scope than the Equal Pay Act, buttress the proposition that the district court should have analyzed the wages of Mr. Galvin and Ms. Johnson to learn whether the discrepancy in their wages was due to sex discrimination. There is no separate establishment problem in Title VII actions to prevent a comparison of the wages of these employees. *Wetzel v. Liberty Mutual Insurance Company*, 449 F. Supp. 397, 407 (W.D. Pa. 1978). The failure of the district court to make this comparison denies an important federal right, and therefore presents a substantial federal question that should be decided by the Supreme Court.

II. Are Geographically Separate Offices of the Same Employer Separate Establishments for the Purposes of Section 6(d) of the Equal Pay Act, 29 U.S.C. § 206(d)(1), Although the Same Functions Are Performed in Each Office, and Some Personnel in One Office Have Identical Duties to Some Personnel in the Other Office?

In *Johnson*, the district court refused to consider whether or not Joan Johnson was denied equal pay for equal work in violation of the Equal Pay Act when her salary was compared with Mr. Galvin of the Minneapolis office. The court deemed the Minneapolis and Kansas City offices to be separate establishments within the meaning of section 206(d)(1) of the Fair Labor Standards Act. Therefore, the court reasoned the two salaries could not be compared to determine whether the Agency participated in discriminatory wage practices on the basis of sex in violation of the Equal Pay Act.

Petitioner respectfully submits that the question of what constitutes a "separate establishment" for the purposes of the Equal Pay Act is an important question of

federal law that has not been, but should be, settled by the Supreme Court. If an employer can discriminate in wages on the basis of sex merely by separating male from female employees, the broad remedial purposes of the Equal Pay Act will not be served. The congressional purpose to alleviate the deleterious social and economic impact on the country resulting from discrimination against women in pay will be denied. When Congress passed the Equal Pay Act, it could not have intended that the entire thrust of the Act could be thwarted by an employer simply by segregating employees according to sex. It is crucial that the Supreme Court decide this issue, and bring to a halt the pernicious attempts to hinder congressional efforts to eliminate sex discrimination in the payment of wages.

The case law on the subject of the definition of the term "separate establishment" for the purpose of section 6(d) of the Equal Pay Act is sparse. Only a few cases have been found that consider the question. Petitioner submits that these cases interpret the term "separate establishment" properly.

In *Brennan v. Goose Creek Consolidated Independent School District*, 519 F.2d 53 (5th Cir. 1975), the court found that defendant school district had discriminated against female janitors by paying them less than male janitors. The court found that the several schools in the district constituted a single establishment even though female and male janitors worked at different physical locations. Crucial to the court's decision was the fact that a central administration hired the janitors, determined their wages, assigned them to a certain building, and controlled, to a great extent, the work schedule and daily duties. The factor of central control over custodial service ni all buildings also led the court in *Marshall v. Dallas Inde-*

pendent School District, 605 F.2d 191 (5th Cir. 1979), to find that all schools in a school district constituted a single establishment. In *Schultz v. Corning Glass Works,* 319 F. Supp. 1161, 1163-64 (W.D. N.Y. 1970), *modified on different grounds sub nom., Hodgson v. Corning Glass Works,* 474 F.2d 226 (2d Cir. 1973), *aff'd sub nom., Corning Glass Works v. Brennan,* 417 U.S. 188 (1974), the district court found that two physically distinct plants made up a single establishment. The two plants shared an office building and used a central employment office, and employees transferred between the two plants, but each plant was a separate manufacturing unit, had its own management, and had a separate payroll department.

In the *Johnson* case, the same central office determined whether or not a prospective employee should be hired or a current employee should be fired. Mr. Pearson from the central office came to the Kansas City office to consult Mr. Higgins about the termination of petitioner. *Johnson,* 23 F.E.P. Cases at 281. The central office determined wages and areas of employee responsibility. Witness the exchange of letters between Mr. Higgins and Mr. Pearson concerning the promotion of Joan Johnson to Roy Wolfe's position. Identical functions were performed in both offices, although the Minneapolis office, as the central office, presumably carried on other activities as well. Mr. Galvin and Ms. Johnson performed substantially equal work. Employees were transferred between and among offices indiscriminately. (For example, Mr. Wolfe was transferred to the Dallas office.) Certainly, the two offices were more functionally and economically integrated and subject to more central authority than the two plants in *Corning Glass Works.* The two offices should be considered a single establishment so that Ms. Johnson can prove that she did not receive equal pay for equal work

in violation of the Equal Pay Act because Mr. Galvin's salary was considerably larger than her salary.

Decisions interpreting other sections of the Fair Labor Standards Act support the proposition that a single establishment may cover several different physical locations. Under section 13(a)(2), 29 U.S.C. § 213(a)(2), concerning the exemption of retail or service establishments from compliance with the Act's minimum wage and overtime provisions, a funeral home and a mutual assessment burial insurance company were held to be a single establishment because of the indiscriminate interchange of employees, identical board of directors, and use of the same premises. *Gillbreath v. Daniel Funeral Home, Inc.*, 421 F.2d 504 (8th Cir. 1970). A business consisting of several food dispensing departments operated in two separate buildings was found to be a single establishment for purposes of section 13(a)(2), because it had central management and supervision. *Mitchell v. Gammill*, 245 F.2d 207 (5th Cir. 1957).

Again, the factor of central control over all the operations of a business determines whether physically separate offices belong to a single establishment. The Kansas City and Minneapolis offices of the Nordstrom-Larpenteur Agency, are controlled in all relevant ways by a central authority. The Branch Manager, Mr. Higgins, reported and was subservient to an executive in the head office. Employees were transferred among different offices. The Minneapolis and Kansas City offices were functionally and economically related.

To hold that the branch offices constitute a single establishment under section 6(d) of the Equal Pay Act would not run contrary to *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945). That opinion, construing section 13(a)(2), emphasized that

> [t]he Fair Labor Standards Act was designed "to extend the frontiers of social progress" by "insuring to all our able-bodied working men and women a fair day's pay for a fair day's work." Message of the President to Congress, May 24, 1934. Any exemption from such humanitarian and remedial legislation must therefore be narrowly construed, giving due regard to the plain statutory language of Congress. To extend an exemption to those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people.

To confer upon respondent the ability to discriminate against women by separating them from offices where men do "substantially equal" work, would "abuse the interpretative process and . . . frustrate the announced will of the people." The Equal Pay Act was enacted so that women would receive equal pay for equal work. That purpose cannot be fulfilled unless this remedial statute is construed to eliminate sex discrimination loopholes for employers. "A narrow construction of the word 'establishment,' as used in section 6(d)(1), might make proof of discrimination difficult, thus frustrating congressional intent." *Brennan v. Goose Creek Consolidated Independent School District*, 519 F.2d 53, 57 (5th Cir. 1975).

III. Did the United States District Court for the District of Minnesota, and the United States Court of Appeals for the Eighth Circuit, Err in Refusing to Allow Petitioner Her Costs Under 42 U.S.C. § 2000e-5 (k)?

The district court refused to award Ms. Johnson her costs of suit despite the fact that she prevailed on a portion of her Title VII claim, because respondent prevailed on its counterclaim. See *Johnson*, 23 F.E.P. Cases at 284 (Order for Judgment ¶ 5). The court of appeals affirmed this

order. *Johnson*, 623 F.2d at 1282 (finding no abuse of discretion). Petitioner respectfully submits that the district court's order disallowing costs amounted to an abuse of discretion, and was contrary to the purpose of the statute, presenting an important federal question to the Supreme Court.

In the first place, the district court should have awarded those costs recoverable under 28 U.S.C. § 1920. Furthermore, petitioner is entitled to recover expenses incurred by her counsel during the prosecution of this action. There is "no sound reason in law or in policy why attorneys' fees should be narrowly interpreted to exclude counsel's reasonable out-of-pocket expenses, and the majority of the courts have approved the award of such out-of-pocket expenses" as part of awardable costs under 42 U.S.C. § 2000e-5(k). *Parker v. Califano*, 443 F. Supp. 789, 794 (D. D.C. 1978), *aff'd without discussion of issue*, 561 F.2d 320 (D.C. Cir. 1977).

The statute, 42 U.S.C. § 2000e-5(k), permits an award of attorney's fees as part of the costs. Semantically speaking, this language would seem to require that expenses be awarded if attorney's fees are awarded, because a prevailing party is allowed costs of which attorney's fees are only a part.

It is absurd to deny petitioner her costs if the goal of Title VII is to be accomplished. Claimants under Title VII frequently receive small back pay awards. Plaintiff's back pay award will be subsumed by the costs that the attorney must charge to her under the disciplinary rules. See ABA Code of Professional Responsibility D.R. 5-103 (Missouri Supreme Court Rule 4, Canon 5, D.R. 5-103). Civil rights plaintiffs will have no incentive to bring cases to enforce the legislative policy to eliminate racial, religious, ethnic or sex discrimination in the wages, terms,

and conditions of employment unless they know they will be awarded costs if they prevail. If costs are not awarded, there will be a disincentive to bring Title VII actions. Few claimants are wealthy enough to bring a Title VII action for vindication of their rights when there is a strong possibility that they will lose money on the deal.

The broad remedial purpose of Title VII will be frustrated unless petitioner is awarded her costs for this suit. The public interest favors bringing Title VII actions to wipe out the invidious discrimination in the marketplace that women have experienced in the past. See generally *New York Gaslight Club v. Carey*, No. 79-192, 22 F.E.P. Cases 1642 (U.S. June 9, 1980). This public interest will suffer unless women are encouraged by every reasonable incentive to bring meritorious lawsuits against recalcitrant employers.

> When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law.
>
> . . . .
>
> Congress therefore enacted the provision for counsel fees - not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, to encourage individuals injured by racial discrimination to seek judicial relief under Title II.

Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 401-02 (1968) (per curiam). Petitioner submits that these same considerations should prevail to compel a district court to award costs in a sex discrimination suit under Title VII unless special circumstances, not here involved, exist.

CONCLUSION

In summation, petitioner Joan Johnson respectfully requests that the Supreme Court of the United States grant this Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit. The courts of appeals differ in their opinions about whether a litigant claiming sex discrimination in wages may obtain relief under Title VII although she is not entitled to relief under the Equal Pay Act. Further, the question of the scope of Title VII presents an important question of federal law that has not been, but should be, resolved by this Court.

Moreover, the question of what constitutes the "same establishment" under the Equal Pay Act so that the work of two employees may be compared to determine whether they are paid equal pay for substantially equal work presents an important question of federal law that has not been, but should be, decided by this Court. Finally, the issue of whether or not a district court should award costs to a prevailing plaintiff in Title VII actions involves an important issue of federal law that should be, but has not been, ruled on by this Court.

For the foregoing reasons, this Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 79-1770

Joan M. Johnson,
Plaintiff-Appellant,

v.

Nordstrom-Larpenteur Agency, Inc.,
Defendant-Appellee.

Appeal from the United States District Court
for the District of Minnesota.

Submitted: March 13, 1980
Filed: June 13, 1980

Before HENLEY and McMILLIAN, Circuit Judges, and HARPER,* Senior District Judge.

HARPER, Senior District Judge.

Appellant, Joan M. Johnson, brought suit against appellee, Nordstrom-Larpenteur Agency, Inc., in two counts, Count I alleging discrimination under Title VII, 1964 Civil Rights Act, as amended 42 U.S.C. §§2000e *et seq.*, and Count II alleging discrimination under the Equal Pay Act

*The Honorable Roy W. Harper, Senior United States District Judge for the Eastern District of Missouri, sitting by designation.

of 1963, 29 U.S.C. § 206 (d). Appellee counterclaimed for monies it alleged was owed to it by the appellant. At trial appellant amended her complaint alleging retaliatory discharge under the Fair Labor Standards Act, 29 U.S.C. § 215(a) (2) and (3).

At the close of trial, the district court dismissed appellant's allegation of retaliatory discharge under 29 U.S.C. § 215 (a) (2) and (3). The court held for appellant under Count I for discrimination against her with respect to pay because of her sex in violation of 42 U.S.C. § 2000e-2(a) for only the period from November 1, 1974, to April 10, 1975, and awarded her $4,422.00 as damages, against appellant under Count I in all other respects, against appellant on Count II, and for appellee on its counterclaim for the sum of $1,922.68.

A timely appeal was made by appellant, raising four issues: (1) The district court erred in failing to find a violation of the Equal Pay Act, (2) the court erred in failing to find that appellant was constructively discharged from her employment, (3) the court erred in failing to find a violation under Title VII of the Civil Rights Act of 1964 from June 19, 1972, until November 1, 1974, and (4) the court erred in denying appellant reasonable attorney's fees and costs as a prevailing party.

Appellant, a white female, began working in the Kansas City office of appellee on June 19, 1972, as a sales assistant. Appellee is an insurance agency that has two primary functions, selling insurance policies to clients and marketing the policies to insurance companies willing to underwrite the risk.

Although appellant's job title was that of sales assistant, her initial duties consisted mainly of assisting the marketing manager, Roy Wolfe. In February of 1973 appellant was reassigned to the sales area.

In November of 1974 Wolfe moved to Dallas as part of a company-wide restructuring of the marketing function. When Wolfe left a substantial part of his job was also transferred out of the Kansas City office.

Appellant was promoted, on a probationary basis, to marketing manager of the Kansas City office. Her salary was increased from $840.00 per month to $900.00, although George Higgins, the Kansas City branch manager, wrote a letter to Glenn Pearson, an executive of appellee, questioning whether "a girl" should be paid that much. Wolfe had been paid an annual salary of $20,800.00 plus $600.00 for expenses. Appellant was paid an annual salary of $10,800.00 with no expense account.

Appellant fell behind in processing her paperwork and because of the backlog on at least two occasions left appellee vulnerable to potential losses by failing to renew coverage of lapsing policies.

Regional marketing manager, Raymond Williams, visited the Kansas City office on March 27, 1975, to review appellant's job problems. He concluded that appellant's inability to organize had caused a serious backlog of paperwork and the resulting problems. Williams and Higgins agreed that appellant had not demonstrated the capability to handle the marketing manager job during her probationary period and that she would have to be terminated. Branch manager Higgins terminated appellant on April 10, 1975. Many of appellant's responsibilities were then absorbed by the sales assistants at the Kansas City office.

Ed O'Malley was hired on or about May 16, 1975, as an account executive. An account executive works in the sales area, with primary responsibility for servicing existing accounts.

Appellee's Kansas City office had approximately ninety percent of its apartment house coverage placed

with the New Providence Corporation, when in late 1975 or early 1976 the New Providence Corporation announced that it would no longer write policies for that line of business. O'Malley was given the primary responsibility for finding other insurance companies with which to place these policies.

Appellant wishes this court to determine that the district court erred by failing to find that appellant's actual job requirements and performance were equal to O'Malley's job requirements and performance. The district court specifically found that the two jobs did not require substantially equal levels of skill, effort and responsibility under similar working conditions. This finding of fact may only be set aside if it is "clearly erroneous," Rule 52(a), Fed. R. Civ. P. "[A] finding of fact is only deemed clearly erroneous if it is not supported by substantial evidence, if it proceeds from an erroneous conception of the applicable law, or if on a consideration of the entire record the appellate court is left with the definite and firm conviction that a mistake has been made." *Southern Illinois Stone Co. v. Universal Engineering*, 592 F.2d 446, 451 (8th Cir. 1979). Upon a review of the record we cannot say that the district court's finding is clearly erroneous. Since the district court found that the two jobs did not require equal skill, effort and responsibility, the court correctly determined that appellant had not proved that she was discriminated against within the meaning of § 206(d) of the Equal Pay Act of 1963.

Appellant raises the question of constructive discharge for the first time on appeal. The doctrine of constructive discharge is applied when an employer deliberately renders an employee's working conditions intolerable, thus forcing him to quit his job. *Muller v. United States Steel Corp.*, 509 F.2d 923, 929 (10th Cir.), *cert. denied*, 423 U.S. 825 (1975). Appellee admits to terminating appellant's

employment, which would seem to make resort to the doctrine of constructive discharge unnecessary. However, there is no need for the court to determine this issue because it is our policy to refuse to consider a question that was never presented to, or passed upon by the trial court. *Ludwig v. Marion Laboratories, Inc.*, 465 F.2d 114, 117 (8th Cir. 1972).

The third issue raised on appeal is the district court's failing to find that appellant was discriminated against from June 19, 1972, until November 1, 1974, under Title VII of the Civil Rights Act of 1964. Appellant argues that during this period her job duties were substantially similar to Wolfe's and that they actually performed the same work. The district court found that between June of 1972 and November of 1974 the responsibilities imposed upon and performed by appellant were substantially less than those of Wolfe and that he was paid a greater salary because his experience, training, education and job responsibilities far exceeded hers. The court's findings concerning the substantial disparity of job qualifications and responsibilities are not clearly erroneous.

The final point on appeal is that the court erred in denying appellant her reasonable attorney's fees and costs since she had prevailed under Count I. Section 2000e-5(k) provides that "in any action or proceeding under this title [42 U.S.C. §§ 2000e *et seq.*] the court, in its discretion, may allow the prevailing party * * * a reasonable attorney's fee as part of the costs * * *." The district court ordered each party to bear its own costs, attorney's fees and disbursements, since each had prevailed on one or more of its claims. Attorney's fees are routinely awarded to a prevailing plaintiff in civil rights cases unless special circumstances render such an award unjust, *Mosby v. Webster College*, 563 F.2d 901, 905 (8th Cir. 1977). Appellee's suc-

cess on its counterclaim for $1,922.68, representing various amounts that appellant owed to her former employer, does not constitute such special circumstances as to render an award of attorney's fees unjust.

In redetermining the amount of fees to which appellant's attorney is entitled, the district court may, on remand, taken into account appellant's limited success including the fact that she recovered on only Count I, and on that count for only five and one-third months out of a period of thirty-three and two-thirds months. *In Re: Southwestern Bell Telephone Co.*, 602 F.2d 845, 850 n.9 (8th Cir. 1979); *Equal Employment Opportunity v. Safeway Stores*, 597 F.2d 251, 253 (10th Cir. 1979); *Hughes v. Repko*, 578 F.2d 483, 487 (3d Cir. 1978); *Muscare v. Quinn*, 614 F.2d 577, 581 (7th Cir. 1980). But as this court noted in *Brown v. Bathke*, 588 F.2d 634 (8th Cir. 1978), the relief which appellant obtained is only one factor to be considered. *Id.* at 638. "Attorney's fees for a claim which is reasonably calculated to advance a client's interests should not * * * be denied solely because that claim did not provide the precise basis for the relief granted." *Id.* at 637. *See also Stanford Daily v. Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974), *aff'd*, 550 F.2d 464 (9th Cir. 1977), *rev'd on other grounds*, 434 U.S. 816 (1978).

Where each of the parties has prevailed on one or more of its claims, defense or counterclaims, the district court has broad discretion in taxing costs, *Cornwell Quality Tools Co. v. C.T.S. Company*, 446 F.2d 825, 833 (9th Cir.), *cert. denied*, 404 U.S. 1049 (1972). We cannot say that the district court abused its discretion in ordering each party to bear its own costs.

Accordingly, we affirm the district court's findings, conclusions and judgment in respect to appellant's claims of sex discrimination. We reverse the court's denial of

attorney's fees and remand for a determination of attorney's fees consistent with this opinion.

We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

A true copy.
Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 79-1770
September Term, 1979

Joan M. Johnson,
Appellant,

vs.

Nordstrom-Larpenteur Agency, Inc.,
Appellee.

Appeal from the United States District Court
for the District of Minnesota

The Court having considered appellant's petition for rehearing and suggestions for rehearing en banc, and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied.

July 17, 1980

APPENDIX C

(August 13, 1979)

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

No. 4-76-Civil 325

Joan M. Johnson,
Plaintiff,

vs.

Nordstrom-Larpenteur Agency, Inc.,
Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER FOR JUDGMENT

This case was tried to the Court for a total of eight days, February 5-9 and March 27-29, 1979. The plaintiff was represented by attorneys William H. Pickett and Sandra Midkiff of Kansas City, Missouri. The defendant was represented by attorneys David A. Ranheim and Jay L. Bennett of Minneapolis, Minnesota. Based upon the evidence adduced at trial and upon the files, records and proceedings herein, the Court makes the following Findings of Fact, Conclusions of Law and Order for Judgment.

FINDINGS OF FACT

JURISDICTION

1. Plaintiff Joan M. Johnson is a white female United States citizen and a resident of the State of Kansas.

2. Defendant Nordstrom-Larpenteur Agency, Inc., is a Delaware corporation with its principal place of business in Minneapolis, Minnesota. Defendant operates on a nationwide basis through branch offices, one of which is located in Mission, Kansas. The defendant is an employer within the meaning of § 701(b) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(b), as amended, and within the meaning of the Equal Pay Act of 1963, 29 U.S.C. § 206(d).

3. Plaintiff was employed by defendant on June 19, 1972, to work in the Mission, Kansas, office, which office is also known as the Kansas City office. Plaintiff worked continuously for defendant in the Kansas City office until April 10, 1975, when she was terminated by defendant.

4. On August 22, 1975, a timely sex discrimination charge against defendant was filed by plaintiff with the Equal Employment Opportunity Commission (EEOC). (Pl. Ex. 76). In her charge plaintiff alleged that defendant had discriminated against her by paying her lower wages for doing the same work as the male Marketing Manager in defendant's Mission, Kansas, office. The discrimination charge filed with the EEOC alleged sex discrimination in the areas of wages, terms and conditions of employment and discharge. Claims that plaintiff was terminated in retaliation for her threats to institute legal action against defendant for discriminatory practices were not incorporated into plaintiff's EEOC charge and were not investigated by the EEOC. (Def. Ex. D). On April 27, 1976, plaintiff received a "right-to-sue" letter from the EEOC, and she commenced this action in a timely manner on July 26, 1976. At trial plaintiff was granted leave to amend her complaint to incorporate allegations that her discharge was the result of retaliation cognizable under the Equal Pay Act of 1963, 29 U.S.C. § 215(a)(2) and (3).

SALARY AND PROMOTIONAL DISCRIMINATION

5. Defendant is a commercial and personal lines insurance agency. In general, defendant's operations can be viewed in terms of "sales" and "marketing" concepts. "Sales" refers to efforts made in contacting and selling insurance to clients or customers who need particular coverage. "Marketing" refers to efforts made in placing an existing or prospective sale with an insurance company willing to underwrite the risk. In June 1972, when defendant hired plaintiff, "sales" efforts in the Kansas City office were directed by Robert Stibor, who was also Branch Manager, and Lowell Davis. "Marketing" efforts were directed by Marketing Manager Roy Wolfe, who reported directly to Roger Walsh, the Vice President of Underwriting in Minneapolis.

6. Though hired as a "Sales Assistant" in June 1972, plaintiff's actual job duties initially were directed more to the "marketing" area, assisting Marketing Manager Roy Wolfe. In the early months of her employment, plaintiff put Messrs. Wolfe and Stibor in contact with local Kansas City representatives of two insurance companies—Great American and INA—with whom she had familiarity by reason of her prior work experience. While plaintiff appears to claim that she was responsible for the agency relationship which was entered into between the Kansas City office of these carriers and defendant's Kansas City office, that claim is not borne out by the testimony of plaintiff's own witnesses—James Harlow and Sara Martin, formerly with the Kansas City offices of INA and Great American, respectively. It also is apparent from the testimony of Roy Wolfe that beyond making the initial contact plaintiff's role was minimal, and that the terms of these agency relationships were negotiated and finalized by Messrs. Wolfe, Stibor and Walsh for Nordstrom and high

officials of INA and Great American. Plaintiff makes no claim that she was responsible for establishing an agency relationship with any other carriers beyond these.

7. During the first several months of her employment, plaintiff placed routine business with existing markets (carriers) and otherwise assisted in the marketing function. Examples of such other assistance within plaintiff's area of responsibility would include (1) coordination of the flow of significant amounts of paper work passing between the "sales" and the "marketing" areas; (2) control over matters affecting expiration of coverage and renewals of existing coverage; (3) handling routine correspondence; and (4) generally completing necessary follow-up on marketing files. Plaintiff's responsibilities continued in this area until approximately February 1973, at which time she was reassigned to a more "sales" oriented job assisting Messrs. Stibor and Davis with "sales" functions. This reassignment resulted from the fact that Mr. Wolfe had become progressively more dissatisfied with plaintiff's abilities effectively to assist him in the routine "marketing" functions. Mr. Wolfe testified that plaintiff's work efforts were up and down in terms of being consistently helpful, and that the result was a "bottleneck" at plaintiff's desk consisting of paper work which was not flowing to carriers at an acceptable rate. To obtain needed assistance, Mr. Wolfe had turned at that time, to "Sales Assistants" Kate Carter and Linda Spencer to help him on matters which were the responsibility of plaintiff prior to her reassignment.

8. Between February 1973 and November 1974 plaintiff remained basically in the "Sales Assistant" position. In this interval, more particularly in April 1973, George J. Higgins joined Nordstrom's Kansas City office as a Producer or Sales Representative, and plaintiff became his designated "Sales Assistant." Thereafter, Mr. Stibor trans-

ferred to Denver and Mr. Davis became Branch Manager. By July 1974 Mr. Davis had left and Mr. Higgins had become Branch Manager with direct supervisory responsibility for everyone in the Kansas City office except Mr. Wolfe, Marketing Manager, who reported directly to Nordstrom's Vice President of Marketing, Roger Walsh, in Minneapolis.

9. At the time he was hired and assumed responsibility for the position of "Marketing Manager" in defendant's Kansas City office in February 1972, Mr. Wolfe had completed a college education, as well as nearly twelve years of underwriting experience directly relevant to the job functions which he assumed with defendant. Mr. Wolfe had accumulated underwriting experience commencing with his employment by American Casualty Insurance Company in August 1960. In January 1963 he became the Branch Casualty Underwriter for the Washington, D.C., office of American Casualty Insurance Company and remained in this position, conducting direct negotiations with insurance agents and determining the acceptability and pricing of agency submissions, until August 1963. At that time Mr. Wolfe went to work for General Accident Insurance Company, an "all lines" company, and became Casualty Underwriting Manager for that company in 1964. In 1966 he accepted an offer of a position as Commercial Underwriting Manager with Safeco Insurance Company in Silver Spring, Maryland. He maintained this position until 1968, when he assumed a Commercial Marketing position with Safeco dealing with agents in the Washington, D.C., area on large commercial accounts. His area of responsibility included the State of Virginia, the State of Maryland and the Washington, D.C., area, and he continued in this position until accepting employment with Nordstrom in 1972.

10. For a period of approximately five years prior to 1967, Roy Wolfe participated in studies and testing leading to his designation in 1967 as a CPCU—Certified Property and Casualty Underwriter. At the time he was employed by the defendant, Mr. Wolfe was one of only three persons within defendant's organization holding this designation. Plaintiff asserted, as a reason for not pursuing a similar course of study in spite of a $1,000 financial incentive offered by defendant during her employment, her view that a CPCU designation basically is insignificant, meaningless and unnecessary to the performance of marketing duties. However, the Court credits the testimony of defendant's representatives Lou Golinvaux and Roy Wolfe, establishing that the CPCU designation is a highly respected indication of relevant experience, training and education and is akin to a CPA designation in the accounting field.

11. Plaintiff's first employment in the insurance industry was at Old American Insurance Company in 1950, which she joined at the age of 17 upon completing high school. She worked there, with interruptions to have three children, until approximately 1957. Plaintiff initially participated in clerical-type functions and eventually worked into an underwriting job in which acceptability of risks was determined by direct reference to established company guidelines. Plaintiff then worked at the Phoenix Assurance Company for approximately one year, and was not employed again until June 1962. From then until May 1963 she worked at Pyramid Life Insurance Company handling applications, matching premium rates, handling endorsements and related functions. Plaintiff was next employed at Commercial Union Insurance Company where she worked from April 1964 until March 1967 in the casualty underwriting department. Plaintiff then worked at the Mann-Kline Insurance Agency in Kansas City for a

few months and then at CNA for about one year until January 1969. Plaintiff then went to work for Marino-Raines, another Kansas City insurance agency, performing work as an assistant and secretary to one of the principals of that agency for a few months, and next became employed at the R. B. Jones Agency apparently in about October 1969. Plaintiff commenced employment at R. B. Jones at $425 per month, the highest monthly salary she had earned during the course of her entire prior employment. Plaintiff worked at R. B. Jones until joining Nordstrom in June 1972, having by that time achieved a salary at R. B. Jones of $625 per month. Plaintiff stated in her Application for Employment (Pl. Ex. 215) that her salary at R. B. Jones was $725 per month.

12. While plaintiff had considerable experience in the insurance industry at the time employed by Nordstrom, it is apparent, and the Court finds, that on a comparative basis, the experience, training, education and overall credentials which Roy Wolfe brought to his job with defendant in Kansas City were greater and more sophisticated than and superior to those of plaintiff, and for a longer period of time had been more directly pertinent to the functions which Mr. Wolfe became responsible for upon accepting employment with Nordstrom in Kansas City.

13. From early 1972 until November 1974, Nordstrom's Kansas City office served as a so-called regional marketing "hub"—that is, it was called upon to market new business generated not only in Kansas City but also by other Nordstrom branch offices which had no marketing personnel. Thus, as Marketing Manager headquartered in the Kansas City office, Roy Wolfe was responsible for "marketing" not only in Kansas City, but also in Nordstrom's branch offices in Omaha, Nebraska; Tulsa, Oklahoma; Oklahoma City, Oklahoma; Little Rock, Arkansas; and for a period of time, Denver, Colorado. Mr. Wolfe's

responsibilities included travel to these branch offices to conduct business, such travel consuming five to ten percent of his working time. He called on insurance carriers in several of those cities, and in fact negotiated agency contracts with Safeco and Royal Globe in some of those cities. He also from time to time accompanied sales personnel in some of those offices in calls upon customers, and personally made calls upon customers and carriers even beyond his assigned region as the need arose. Other responsibilities expected of and performed by Mr. Wolfe included primary responsibility for furthering relationships and negotiating better contingency contracts or commission scales with several existing carriers, and persuading such carriers to underwrite national programs, thereby extending those services to Nordstrom's existing or potential customers nationwide. Mr. Wolfe was also responsible for finding carriers for especially significant or complex transactions, and then negotiating the price which those carriers would charge defendant for the insurance written. These situations included not only Kansas City and regional business, but referrals from elsewhere in the Nordstrom system. Mr. Wolfe in fact executed these responsibilities.

14. Although plaintiff attempted at trial to describe her own job duties as parallel to those of Mr. Wolfe, the Court is persuaded that between the date of her hire in June 1972 and November 1974 the responsibilities imposed upon and performed by plaintiff were substantially less than those of Mr. Wolfe. Plaintiff was not responsible for soliciting and did not solicit new markets or carriers, or negotiate commission scales or contracts with carriers at a level which could be meaningfully compared with that of Roy Wolfe. She was not responsible for and not involved in the marketing function at other branch offices or traveling to those offices, placing risks referred from those offices except in isolated instances, or establishing

national programs or marketing new business referred from other areas of the country, as Mr. Wolfe was. While working as a "Sales Assistant" for Messrs. Stibor, Davis and/or Higgins, plaintiff was not asked to assume and did not assume independent responsibility for customer accounts, unlike Mr. Wolfe. While working as a "Sales Assistant" to Mr. Higgins, plaintiff's primary responsibilities essentially were limited to routine carrier and customer contacts and were predominantly in-office. Plaintiff's function was, in part, to place risks which were generally less complicated than risks negotiated by and ultimately marketed by Mr. Wolfe. Plaintiff, unlike Roy Wolfe, had no reporting responsibility to corporate marketing head Roger Walsh, and signed no employment agreement containing a non-compete clause. In short, the Court finds that the evidence taken as a whole fails to establish plaintiff's claim that she and Mr. Wolfe performed substantially the same job side by side until November 1974, and does establish the contrary.

15. Between June 1972 and November 1974 Roy Wolfe was paid more than plaintiff Joan Johnson because his experience, training and education placed him in a position where he had the capability of providing service at a level more sophisticated and productive than that of plaintiff. Moreover, Mr. Wolfe was paid more than plaintiff because his job responsibilities far exceeded her own, his responsibilities but not hers touching such areas as travel to other offices in the region, involvement in establishing national programs, direct negotiation of complicated risks and appropriate premium coverage with carriers and, generally, contact with carriers at a level in management above that normally contacted by plaintiff.

16. Uncontradicted testimony of defendant's witnesses Golinvaux, Higgins, Wolfe and Williams confirms

that, effective November 1, 1974, Nordstrom implemented a restructuring and reorganization of the corporate "marketing" function. The Kansas City office, previously a "hub" responsible for marketing not only in Kansas City but in the region including the branch offices in Omaha, Tulsa, Oklahoma City, Little Rock and Denver, assumed a substantially reduced local marketing function. Minneapolis became the North Central "regional marketing hub" responsible for marketing efforts, to the extent still existent, in Kansas City and Omaha. Raymond Williams became "Regional Marketing Manager" in Minneapolis with responsibility for the marketing function in the Twin Cities area, Omaha and Kansas City. Marketing Manager Roy Wolfe was transferred from Kansas City to Dallas, Texas, where he became a "Regional Marketing Manager" responsible for coordinating the "marketing" function in the Southwest Region.

17. After considering the evidence, the Court is convinced that when Marketing Manager Roy Wolfe transferred to Dallas, he took with him the majority of the responsibilities which he had assumed while working in Kansas City. The "marketing" function in Kansas City after Mr. Wolfe's departure became predominantly oriented to coordinating the flow of heavy amounts of paper work, placing repeat or routine business and the like. The Kansas City office was no longer responsible for soliciting new markets or carriers and plaintiff in fact did not do so. Responsibilities for negotiating commission scales were, so far as they related to Kansas City operations, forwarded to the Minneapolis regional marketing hub and plaintiff was not involved in that. There was no negotiation of new contingency contracts after November 1, 1974, by Kansas City personnel, including plaintiff, and no national programs were established there after that date. Despite the reorganization of the Kansas City office

in November 1974, occasional interbranch and national account inquiries continued for a limited period of time and plaintiff participated in a minor way in the disposition of these inquiries.

18. On November 6, 1974, Jim Higgins wrote to Glenn Pearson, an executive in Minneapolis of the defendant, regarding the office staff changes in the Mission, Kansas, office. Mr. Higgins stated to Mr. Pearson that since Roy Wolfe was leaving on November 29, 1974, that Joan Johnson will be marketing man (?). He further stated that they were adding another *girl* to replace Joan as sales assistant on November 11. Mr. Higgins acknowledged that Joan Johnson is receiving a promotion in replacing Roy Wolfe as marketing manager. Because of the promotion a salary increase should follow. Mr. Higgins recommended that her salary be increased from $840 to $900 per month. With that increase it would still reduce the office overhead of the Mission, Kansas, office by $14,620 annually. Mr. Higgins stated that he fully realized that the $900 per month is too much money for a *girl* but he acknowledged that you couldn't give her the job, title and responsibility and not the pay. The salary savings of $14,620 was computed in the following fashion: Roy's salary is $20,800 plus $600 of expenses for a total of $21,400 annually. A new girl is being paid $6,000 and therefore deducting her salary from Roy's salary plus expenses leaves $15,400. Then deducting Joan's increase of $780 annually from $15-400 there is a savings to the office of $14,620 in having Joan Johnson take over all of the marketing functions.

19. On November 18, 1974, Glenn Pearson responded to Jim Higgins' memo of November 6, 1974, regarding Joan Johnson's marketing promotion and stated: that after Roy's transfer to Dallas on November 29, 1974, we should inform Joan Johnson that she will be taking over charge

of the marketing and if she does the job we will increase her salary but we want to evaluate her capabilities of handling that function first. Mr. Pearson had a conversation with Ray Williams, the marketing manager for the region that the Mission, Kansas, office was in, and Mr. Williams stated that Joan was capable of doing the job and that Mr. Williams would be of assistance to her in handling any hard to market matters.

20. On November 25, 1974, Mr. Higgins wrote to Mr. Pearson that holding off the raise was questionable. Mr. Higgins had suggested to Mr. Williams that the defendant pay her $50 per month for expenses in lieu of a raise. Mr. Higgins informed Mr. Pearson on November 25, 1974, in this memorandum that Joan Johnson felt that she is replacing a man and is entitled to the pay. Mr. Higgins stated that the expense suggestion that he made might be a better way to handle the problem.

21. On December 2, 1974, Mr. Pearson wrote to Mr. Higgins stating: I do not want to get involved with expense accounts for our marketing girls because if the word got out that that was occurring Mr. Pearson would be faced with expense checks for the Minneapolis marketing girls and then even sales assistants would want expense accounts. Mr. Pearson said to keep Mr. Higgins' office running smoothly that he will increase Joan Johnson's salary pursuant to Mr. Higgins' original memoranda and make it effective on December 15, 1974, with the next salary review set up for December 15, 1975.

22. After November 1974 Ray Williams, a marketing representative and new marketing manager of the region that the Kansas City office was in, visited Joan Johnson in the Mission, Kansas, office. Ray Williams took Joan Johnson to five insurance companies and introduced Joan Johnson as Wolfe's replacement and that there would be

no change in any of the problems or handling or office procedure because Joan Johnson would still be there in charge of all of the marketing.

23. The evidence established that the Kansas City office of the defendant was a separate establishment and that the Minneapolis office was a separate establishment. The evidence and exhibits introduced at trial relating to the Minneapolis office are, therefore, irrelevant.

24. The Court has found that the responsibilities after November 1974 of the Marketing Manager of the Kansas City office were much diminished but that after the reorganization plaintiff was considered by defendant to be a probationary replacement for Roy Wolfe. The two jobs, however, did not require the performance of equal work, skill, effort and responsibility and plaintiff did not in fact exercise equal skill, effort and responsibility. Plaintiff is not entitled to recover under the Equal Pay Act.

TERMINATION

25. The Court is persuaded that plaintiff was designated to assume responsibility for a reduced marketing function in defendant's Kansas City office in November 1974 on a probationary basis. (Pl. Ex. 284). Raymond Williams, to whom plaintiff thereafter reported with respect to her marketing functions, established a procedure for the submission of weekly marketing reports by plaintiff, and he also set aside a specific two hour block of time on Friday of each week for plaintiff to communicate with him by telephone to seek guidance on problems or questions or to report information concerning her activities. Though there is a dispute in the testimony on this issue, the Court accepts the testimony of Mr. Williams that plaintiff took advantage of the opportunity to communicate by telephone on Friday fewer than three times during

the entire period November 1974 until April 10, 1975, and that plaintiff was, as a rule, tardy in the submission of her weekly report forms and for the last two months of her employment failed to submit any at all. Both Higgins and Williams reminded plaintiff frequently of her reporting obligations, without significant success. More importantly, however, the Court is persuaded, by the testimony of Branch Manager Higgins and Linda Spencer, plaintiff's former coworker and friend, that plaintiff quickly fell behind in her responsibilities to maintain internal procedures conducive to a prompt, orderly and accurate flow of information and paper work to the carriers. As a result, plaintiff's desk became a "logjam" which created internal problems at the Kansas City office and elsewhere in the Nordstrom system, and led to dissatisfaction on the part of carriers whose requests for information or action were not being handled promptly by plaintiff.

26. The Court credits the testimony of Raymond Williams and Jim Higgins, over that of plaintiff, that plaintiff's omissions exposed the defendant to at least two potential significant errors and omissions losses which, had the losses occurred, would have obligated Nordstrom to reimburse clients out of Nordstrom corporate assets due to plaintiff's failure to see that critical builder's risk coverage was continued in effect. Though plaintiff testified with respect to one exposure (Def. Ex. B) that she never saw the letter from the carrier which indicated that it would not renew the coverage and remarketing elsewhere would be necessary, the Court, after reviewing the documentation and the testimony of defendant's witnesses, is convinced that plaintiff simply allowed this letter to become a part of her unorganized, accumulated paper work and failed to notice it or take action until coverage on a nearly one million dollar construction project had lapsed. Even without looking to the aforementioned letter, the file on that

project establishes (Def. Ex. B), and plaintiff herself conceded, that it was her responsibility to follow through on renewals of coverage some 60-90 days before expiration, yet she took no steps to effectuate renewal with the existing carrier until a day after coverage already had lapsed. The project was without coverage for at least ten days until it was placed with another carrier, after plaintiff was advised a second time that the existing carrier would not renew coverage. On the second matter, plaintiff's failure to execute her responsibilities resulted in a builder's risk coverage lapse on a $1.6 million project. Plaintiff herself testified that upon realizing that coverage had lapsed on that project, she immediately contacted Raymond Williams in Minneapolis, knowing that he would have to remarket this coverage. He in fact did so that same evening. The Court finds this testimony to be additional support for defendant's position that marketing responsibility for serious problems or involved risks was transferred out of Kansas City as of November 1974. These two incidents were cause in themselves for considerable alarm on the part of Higgins and Williams about plaintiff's ability to function responsibly in her position with defendant, and the Court finds this evidence to be especially probative on the issue of justification for defendant's termination of plaintiff shortly thereafter.

27. Plaintiff testified that after November 1, 1974, she was overburdened by retained responsibility in certain "Sales Assistant" functions as well as her new assignment as "Marketing Assistant" and that her repeated requests for assistance with her heavy work load were never met. The Court, however, accepts the testimony of Mr. Higgins to the effect that the work load was not so great as to economically justify the hiring of an assistant to plaintiff, particularly in view of the fact that the Kansas City office had a greatly diminished role after the November 1974

reorganization but still had the same number of employees that it had before the reorganization. The Court also notes the evidence to the effect that any "Sales Assistant" oriented efforts retained by plaintiff were retained at her own request. Moreover, pertinent to plaintiff's claim of being overburdened, and to the issue of her ultimate discharge, is the testimony introduced by defendant that plaintiff was unduly tardy and spent excessive amounts of time during working hours on personal matters, such as telephone calls, problems which were discussed with plaintiff by Mr. Higgins on repeated occasions. More particularly, witnesses Linda Spencer, a coworker with plaintiff, and Branch Manager Higgins testified that during the final four to six months of plaintiff's employment her tardiness ranged from fifteen minutes to two or three hours as frequently as two to three times per week. Ms. Spencer further testified that reasons cited by plaintiff for her tardiness ranged from oversleeping to stopping to visit or check on her mother to taking her son to school when he missed the bus. Although plaintiff was accommodated by Branch Manager Higgins in deferring her starting time until 9:00 A.M., her tardiness, nevertheless, continued and eventually became as frequent as two to four times during a week. Moreover, the Court accepts the testimony of Linda Spencer that plaintiff spent excessive amounts of time on personal telephone calls during working hours. Plaintiff points to her time cards as evidence of her time on the job; however, the evidence establishes that these cards do not reflect actual arrival and departure times, and do not even necessarily reflect the actual number of hours worked since they were routinely filled out for the same number of hours each day, sometimes long after the fact. The evidence also fails to establish that plaintiff worked evening or weekend hours to make up for time lost during the day.

28. Regional Marketing Manager Raymond Williams traveled to the Kansas City office on March 27, 1975, both to follow up on plaintiff's serious omissions which had resulted in the above mentioned builder's risk coverage lapses, and to pursue Mr. Higgins' mounting concern over plaintiff's failure to process paper work through the Kansas City office and otherwise carry out her assigned tasks. The Court takes note of the Linda Spencer testimony that on two occasions during the last 60 days of plaintiff's employment, Mr. Higgins had spoken with Spencer in her capacity as Office Manager regarding these deficiencies in plaintiff's job performance. Mr. Williams found that plaintiff's filing procedures were self-defeating and that the paper flow had bogged down to the extent that everything was in a "rush" position. He further found long unmarketed risks and unmet requests for data from carriers and others, and in general confirmed Higgins' reports concerning plaintiff's inability to function in her job. While plaintiff again attributed these problems to her heavy work load, and in one instance to the failure of others to provide her with information needed to market the risk, the Court, after reviewing the conflicting evidence, accepts the more substantive and convincing testimony of Mr. Higgins and Mr. Williams to the effect that plaintiff's inability to organize herself and her time, and her inattention to her duties, resulted in the serious backlog of paper work and other problems which were revealed during Mr. Williams' March 27, 1975, trip. (Pl. Ex. 221).

29. At the conclusion of Mr. Williams' March 27, 1975, visit, Branch Manager Higgins drove Mr. Williams to the airport. During the return to the airport these men discussed plaintiff's job performance. They mutually agreed that, during her probationary period, plaintiff had not established an ability to maintain a proper flow of paper work from "sales" through "marketing" to carriers. The

Court notes that this is the same deficiency which led Roy Wolfe ultimately to refrain from using plaintiff as a Marketing Assistant in 1972; the "bottleneck" at the plaintiff's desk occurred then as well. Additionally, Mr. Higgins and Mr. Williams concurred that continuing plaintiff's employment as a Marketing Assistant could again expose Nordstrom to additional huge errors and omissions losses. Mr. Higgins and Mr. Williams ultimately concluded that plaintiff's termination was required. After obtaining the further approval of his own superior, the Regional Vice President, Branch Manager Higgins terminated plaintiff in a private office conference with plaintiff on April 10, 1975.

30. Plaintiff asserted that her termination was the result of retaliation against her because of her complaints that she was doing equal work for unequal pay and intended to sue Nordstrom and Manager Higgins because of this. Plaintiff acknowledged that statements of intended legal action were never directly communicated by her to Branch Manager Higgins, but asserted that she made such statements to employees Linda Spencer, James Stilwell and Charlotte Kuhn. Linda Spencer testified that plaintiff did make reference to such intended action; however, Ms. Spencer testified unequivocally that she never forwarded such information to Mr. Higgins. Mr. Higgins categorically denied that he had been informed of any intended legal action prior to the time he terminated plaintiff. Moreover, though plaintiff purportedly stated to employee James Stilwell that she intended to proceed with legal action, intending that Mr. Stilwell pass this information on to Mr. Higgins, Mr. Higgins again denied that Mr. Stilwell ever mentioned the subject to him prior to plaintiff's termination. Raymond Williams also testified that he knew nothing of any intended legal action by plaintiff at any time prior to plaintiff's termination. The Court, after reviewing all evidence on the "retaliation" issue, was per-

suaded that the termination of plaintiff was not in any way the result of retaliation against threats of intended legal proceedings, and therefore at the close of trial dismissed plaintiff's "retaliation" claims, to the extent not already barred on jurisdictional or other grounds.

POST-TERMINATION EVENTS

31. The testimony of Linda Spencer and George J. Higgins indicates that the Sales Assistants absorbed many of plaintiff's responsibilities during the months following plaintiff's termination. Shortly after the termination Mr. Higgins was summoned into conferences with carriers Great American and INA in Kansas City and was informed of serious breakdowns in communications in plaintiff's area of responsibility, which had taken place during the previous months between Nordstrom's Kansas City office and these offices. Failure to answer routine marketing inquiries for periods as long as six to eight months were brought to Mr. Higgins' attention and, at the conclusion of each meeting, Mr. Higgins expressed his fervent intention to correct this situation. He and others in the Kansas City office spent four to five days a week for about a month attending to and cleaning up the marketing backlog left by plaintiff. These meetings with insurance carriers occurred after plaintiff's termination and the Court finds testimony regarding such meetings to be irrelevant to the question of whether proper cause for plaintiff's termination has been established. However, such testimony does confirm Mr. Higgins' testimony that the marketing function had become seriously backlogged and required immediate action after plaintiff's departure.

32. On or about May 16, 1975, Mr. Higgins hired Ed O'Malley to commence work on or about May 27, 1975, as an Account Executive. Within the Nordstrom organization

an "Account Executive" has no new business responsibility but is in the sales area with production responsibility for servicing existing accounts. Unlike a Sales Assistant or Marketing Assistant, an Account Executive bears sole responsibility for servicing particular accounts which are given to him for maintenance. Additionally, whereas the Sales Assistant function is basically an internal function carried out in Nordstrom's office, the Account Executive frequently visits client or customer offices to consult with and advise them of their insurance needs in much the same manner as producers or sales representatives. Plaintiff failed to produce evidence establishing the details of Mr. O'Malley's actual job duties and responsibilities. From the testimony of Mr. Higgins, however, it appears that Mr. O'Malley functioned basically in the sales oriented Account Executive role, and also relieved Mr. Higgins of some of the more "marketing" oriented functions for which Higgins had been responsible since Roy Wolfe's departure in November 1974. In late 1975 or early 1976 one of the Nordstrom Kansas City office's main "markets" for apartment house business, the New Providence Corporation (NPC), indicated that no apartment house coverage would be written or renewed and that NPC was getting out of that line of business. At that time Nordstrom's Kansas City office had some 90% of its apartment house coverage placed with NPC, and it had been the function primarily of the Sales Assistants to maintain this coverage pursuant to established policies. Accordingly, Nordstrom was confronted with the need to keep its apartment house business properly placed, and the immediate need to remarket this coverage inundated the Kansas City office with marketing difficulties and paper work. Mr. Higgins testified that he had to choose whether to assume this marketing responsibility himself or delegate it, and that he chose to direct Mr. O'Malley to assume primary responsibility for co-

ordinating this marketing effort. It was this unique and temporary circumstance which resulted in Mr. O'Malley spending virtually full time in a "marketing" function during the early part of 1976 (Pl. Ex. 259), a year after plaintiff was terminated.

33. Though plaintiff would have the Court find that Mr. O'Malley was simply a Marketing Assistant with a fancier title and more salary, the Court is convinced that the marketing functions to which plaintiff had been assigned were absorbed by the Kansas City office staff as a whole. The only evidence as to Mr. O'Malley's duties establishes that, though temporarily thrust into the remarketing effort on apartment business several months after his initial employment, he has functioned throughout his employment in the Account Executive area performing duties which cannot be equated with those performed by plaintiff prior to April 10, 1975. The position which plaintiff held between November 1974 and April 10, 1975, and the position held by Mr. O'Malley, commencing with his employment in May 1975, were not consecutively held positions and were not substantially equal, most particularly in the area of responsibility but also in the areas of skill and effort.

COUNTERCLAIM

34. Defendant has counterclaimed that at the time plaintiff was terminated she owed defendant $1,922.68. This sum, according to the testimony of Mr. Higgins, was due (1) for unpaid premiums on personal insurance for plaintiff and her daughter ($1,232.68); (2) for cash advances never reimbursed ($600); and (3) for delinquent parking charges ($90). Plaintiff admits she did not pay for the $90 parking bill. She claims Robert Stibor advanced her $300 and later told her not to worry about it

since he would write it off. The Court does not credit plaintiff's assertions that defendant simply forgave a $300 advance to cover personal expenses while plaintiff awaited a salary check, and concludes that this amount is owing. The second $300 within defendant's $600 claim for cash advances, according to Mr. Higgins, was for Kansas City Chiefs football tickets, and plaintiff offered no testimony to rebut this aspect of defendant's "cash advance" claim. Finally, based upon the testimony and documentation available (Def. Ex. P), the Court finds that plaintiff never reimbursed defendant for insurance covering plaintiff and her daughter with premiums totaling $1,232.68.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and subject matter jurisdiction over this action pursuant to § 706(f)(3) of Title VII, 1964 Civil Rights Act, as amended, 42 U.S.C. § 2000e-5(f)(3), pursuant to the Equal Pay Act, 29 U.S.C. § 206(d) and pursuant to 28 U.S.C. § 1343(4). Defendant Nordstrom-Larpenteur Agency, Inc., is an employer within the meaning of § 701(b) of Title VII, 1964 Civil Rights Act, as amended, 42 U.S.C. § 2000e(b), and subject to the Equal Pay Act, 29 U.S.C. § 206(d). Defendant's Kansas City office is a separate "establishment" within the meaning of 29 U.S.C. § 206(d).

2. Plaintiff's complaint incorporates two counts. Count I alleges that defendant violated Title VII of the Civil Rights Act of 1964 by (i) subjecting plaintiff to disparate treatment during the course of her employment in the terms of her rate of pay, salary, fringe benefits and commissions [42 U.S.C. § 2000e-2]; and (ii) discharging her in retaliation for her opposition to this disparate treatment [42 U.S.C. § 2000e-3(a)]. Section 703(a)(1) of Title VII [42 U.S.C. § 2000e-2(a)(1)] provides, in pertinent part, that:

"(a) It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex, ..."

Section 704(a) of Title VII [42 U.S.C. § 2000e-3(a)] provides in pertinent part, that:

"(a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."

3. Count II of plaintiff's complaint herein claims violations of the Equal Pay Act of 1963 [29 U.S.C. § 206(d)]. The language which plaintiff claims defendant violated [29 U.S.C. § 206(d)] is as follows:

"(d)(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to

employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any factor other than sex . . . ."

4. The Court concludes that plaintiff has proved that from November 1, 1974, to April 10, 1975, that she was discriminated against by defendant with respect to pay and promotion because of her sex in violation of § 703(a) of Title VII, 42 U.S.C. § 2000(e)-2(a). Plaintiff's damages cannot be measured precisely. At some point in November 1974 plaintiff assumed replacement of Wolfe but with much less responsibility. In November or December plaintiff's salary was increased to $10,800 per year. Wolfe's salary had been $20,800 per year. O'Malley was hired in late May 1975 as an Account Executive in primarily a sales capacity but with some marketing responsibility. O'Malley was paid at the rate of $18,600 per year. The difference between Wolfe's $20,800 and plaintiff's $10,800 is $10,000 or $833 per month. The latter amount times five and one-third months equals $4,442 and this is the amount of damages to which plaintiff is entitled.

5. In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the Supreme Court articulated the requirements plaintiff must satisfy to make out a claim of retaliatory discharge under § 704(a) of Title VII, 1964 Civil Rights Act, as amended, 42 U.S.C. § 2000e-3(a). Not only did plaintiff fail to prove such a claim, but also such claim was not included in plaintiff's EEOC charge and therefore the Court is without jurisdiction to review the retaliation claim. *See*

McDonnell Douglas Corp., supra. It was for these reasons that the Court dismissed this claim at the close of trial, and here confirms that dismissal.

6. With respect to plaintiff's claims under the Equal Pay Act of 1963, 29 U.S.C. § 206(d), this Court concludes that plaintiff did not hold a position which was substantially equal in terms of skill, effort and responsibility, either concurrently or consecutively, to that position held by Roy Wolfe. The Court further concludes that the defendant has rebutted any allegations that the position held by Ed O'Malley was a position held consecutively to that held by plaintiff incorporating substantially equal levels of skill, effort and responsibility under similar working conditions. Accordingly, plaintiff has failed to prove that she was discriminated against within the meaning of § 206(d) of the Equal Pay Act of 1963.

7. The Court, having granted plaintiff leave to amend her complaint during trial to incorporate allegations of retaliatory discharge under §§ 215(a)(2) and (3) of the Fair Labor Standards Act [29 U.S.C. § 215(a)(2) and (3)], concluded that applicability of these provisions to the instant case is questionable, and, further, that the evidence adduced by plaintiff failed to establish any violation of these provisions here. Therefore, the Court dismissed these amended allegations at the close of trial, and here confirms that dismissal.

8. Having reviewed all the evidence respecting defendant's counterclaim, the Court concludes that plaintiff owes defendant the sum of $1,232.68 for unpaid premiums on plaintiff's personal insurance, $600 for certain cash advances, and $90 for delinquent parking charges which were paid on plaintiff's behalf by defendant. In total, the Court concludes that plaintiff owes defendant the sum of $1,922.68.

ORDER FOR JUDGMENT

1. Judgment will be entered for defendant on plaintiff's claim of retaliatory discharge under Title VII of the 1964 Civil Rights Act and the Equal Pay Act of 1963.

2. Judgment will be entered for defendant on Count II of plaintiff's complaint on the claimed violation of the Equal Pay Act of 1963.

3. Judgment will be entered for plaintiff in the amount of $4,442 on Count I of plaintiff's complaint on the claimed violation of Title VII of the Civil Rights Act of 1964.

4. Judgment will be entered for defendant on its counterclaim against plaintiff in the amount of $1,922.68.

5. Each of the parties has prevailed on one or more of its claims, defenses or counterclaims. Each party will therefore bear its own costs (including attorney's fees) and disbursements.

/s/ Earl R. Larson
United States Senior District Judge

August 9, 1979.

APPENDIX D

STATUTES INVOLVED

28 U.S.C. § 1254(1) (Jurisdiction of the Supreme Court) (28 U.S.C. § 1254 at 157 (1976)).

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree . . . .

28 U.S.C. § 1291 (Final Decisions of District Courts) (28 U.S.C. § 1291 at 159 (1976)).

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

28 U.S.C. § 1331(a) (Federal Questions) (28 U.S.C. § 1331 at 164 (1976)).

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000.00, exclusive of interests and costs, and arises under the Constitution, laws, or treaties of the United States, except that no such sum or value shall be required in any such action brought against the United States, any agency, thereof, or any officer or employee thereof in his official capacity.

28 U.S.C. § 1343(a)(4) (Civil Rights and Elective Franchise) (28 U.S.C. § 1343 at 170 (1976) or 28 U.S.C.A. § 1343 at 32 (Supp. 1980)).

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

. . . .

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

28 U.S.C. § 1920 (Taxation of Costs) (28 U.S.C. § 1920 at 239 (1976) (¶¶1-4) and 28 U.S.C.A. § 1920 at 185 (Supp. 1980) (¶¶5-6)).

A judge or clerk of any court of the United States may tax as costs the following:

(1) Fees of the clerk and marshal;

(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

(5) Docket fees under section 1923 of this title;

(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

Fair Labor Standards Act, 29 U.S.C. § 203(d), (e)(1) (Definitions) (29 U.S.C. § 203 at 740).

As used in this chapter -

. . . .

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

(e) (1) Except as provided in paragraphs (2) and (3), the term "employee" means any individual employed by an employer.

Fair Labor Standards Act § 6(d), 29 U.S.C. § 206(d)(1) (Equal Pay Act) (29 U.S.C. § 206 at 748 (1976)).

(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided,* That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

Fair Labor Standards Act, 29 U.S.C. § 213(a)(2) (Exemptions) (29 U.S.C. § 213 at 761 (1976) or 29 U.S.C.A. § 213 at 43 (Supp. 1980)).

(a) The provisions of section 206 (except subsection (d) in the case of paragraph (1) of this subsection) and section 207 of this title shall not apply with respect to -

. . . .

(2) any employee employed by any retail or service establishment (except an establishment or employee engaged in laundering, cleaning, or repairing clothing or fabrics or an establishment engaged in the operation of a hospital, institution, or school described in section 203(s)(5) of this title), if more than 50 per centum of such establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located, and such establishment is not in an enterprise described in section 203(s) of this title. A "retail or service establishment" shall mean an establishment 75 per centum of whose annual dollar volume of sale of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry . . . .

Title VII of the Civil Rights Act of 1964, § 701(b), 42 U.S.C. § 2000e(b), (f) (Definitions) (42 U.S.C. § 2000e at 1230-31 (1976)).

For purposes of this subchapter -

. . . .

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term

does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

. . . .

(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision.

Title VII of the Civil Rights Act of 1964, § 703(a), 42 U.S.C. § 2000e-2(a) (Unlawful Employment Practices) (42 U.S.C. § 2000e-2 at 1237 (1976)).

(a) It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because

of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.

Title VII of the Civil Rights Act of 1964, § 703(h), 42 U.S.C. § 2000e-2(h) (The Bennett Amendment) (42 U.S.C. § 2000e-2 at 1238 (1976)).

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differeences [sic] are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of title 29.

Title VII of the Civil Rights Act of 1964, § 706(f)(3), (g), (k), 42 U.S.C. § 2000e-5(f)(3), (g), (j), (k) (Remedies; Appeals; Attorney's Fees) (42 U.S.C. § 2000e-5 at 1242-43 (1976)).

(f)(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

. . . .

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date

more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

. . . .

(k) In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

REGULATION INVOLVED

Equal Employment Opportunity Commission, 29 C.F.R. § 1604.8 (29 C.F.R. § 1604 at 915-16 (1979)).

(a) The employee coverage of the prohibitions against discrimination based on sex contained in title VII is coextensive with that of the other prohibitions contained in title VII and is not limited by section 703(h) to those employees covered by the Fair Labor Standards Act.

(b) By virtue of section 703(h), a defense based on the Equal Pay Act may be raised in a proceeding under Title VII.

(c) Where such a defense is raised the Commission will give appropriate consideration to the interpretations of the Administrator, Wage and Hour Division, Department of Labor, but will not be bound thereby.

MISCELLANEOUS

American Bar Association Code of Professional Responsibility, Disciplinary Rule 5-103 (Avoiding Acquisition of Interest in Litigation) (Missouri Supreme Court Rule 4, Canon 5, D.R. 5-103).

(A) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation he is conducting for a client, except that he may:

(1) Acquire a lien granted by law to secure his fee or expenses.

(2) Contract with a client for a reasonable contingent fee in a civil case.

(B) While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to his client, except that the lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses.

Supreme Court, U. S.
FILED
NOV 14 1980
MICHAEL RODAK, JR., CLERK

NO. 80-609

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JOAN M. JOHNSON,

Petitioner,

vs.

NORDSTROM-LARPENTEUR AGENCY, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

		Page
I.	STATEMENT OF THE CASE	1
II.	ARGUMENT	4
	A. Petitioner's Primary Argument, That Title VII Is Broader Than the Equal Pay Act And Permits a Finding of Discrimination in Compensation Based Upon Evidence Other Than Equal Pay Act Standards, Was Acknowledged by the District Court and Confirmed by the Eighth Circuit, Consistent with the Decisions in Other Circuits, and Thus Raises No Certworthy Issue	5
	B. Petitioner's Argument Concerning the Proper "Establishment" for Equal Pay Act Application Is a Pure Fact Argument Which Involves No Important Question of Federal Law, and Thus Raises No Certworthy Issue	12
	C. Petitioner's Recurring Demand for Recovery of Costs Raises No Certworthy Issue	13
III.	CONCLUSION	14

TABLE OF AUTHORITIES

Cases:

Cornwell Quality Tools Co. v. C.T.S. Co., 446 F.2d 825 (9th Cir. 1971), *cert. denied,* 404 U.S. 1049 (1972) 13

DiSalvo v. Chamber of Commerce of Greater Kansas City, 568 F.2d 593 (8th Cir. 1978) 9, 10

Gunther v. County of Washington, 602 F.2d 882 (9th Cir. 1979), *rehearing denied,* 22 F.E.P. Cases 1650 (1980) 8, 9, 10, 11

I.U.E. v. Westinghouse Electric Corp., 23 F.E.P. Cases 588 (3d Cir. 1980) 8, 10, 11

I.U.E. v. Westinghouse Electric Corp., 19 F.E.P. Cases 450 (D.N.J. 1979) 10
Johnson v. Nordstrom-Larpenteur Agency, Inc., 623 F. 2d 1279 (8th Cir. 1980) 6, 13
Johnson v. Nordstrom-Larpenteur Agency, Inc., 23 F.E.P. Cases 274 (D. Minn. 1979) 1
Laffey v. Northwest Airlines, Inc., 567 F.2d 429 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978) 10
Manhart v. City of Los Angeles Dept. of Power & Water, 553 F.2d 581 (9th Cir. 1976), *aff'd in part and rev'd in part on other grounds*, 435 U.S. 702 (1978) 10-11
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Other Authorities:

United States Supreme Court Rule 17 1
United States Supreme Court Rule 17(a) 11
United States Supreme Court Rule 17(c) 11

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I.

STATEMENT OF THE CASE

Petitioner's statement of the case unduly complicates and distorts the pertinent facts in an apparent effort to create new legal issues cognizable under Rule 17 of the Rules of this Court. The operative facts, detailed in the District Court's findings and reviewed and affirmed by the Eighth Circuit under the clearly erroneous standard,[1] can be briefly summarized.

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[1]The District Court's decision, *Johnson v. Nordstrom-Larpenteur Agency, Inc.*, 23 F.E.P. Cases 274 (D. Minn. 1979), incorporates detailed findings and then applies clearly established and uniformly interpreted Equal Pay Act and Title VII law in reaching its conclusions. The Eighth Circuit held that the District Court's findings are not clearly erroneous. *Johnson v. Nordstrom-Larpenteur Agency, Inc.*, 623 F.2d 1279 (8th Cir. 1980). This should put an end to what always has been a case involving pure issues of fact, not law.

Respondent is a commercial and personal lines insurance agency with separate and administratively autonomous offices throughout the country. Its operations can be viewed in terms of "sales" and "marketing" concepts. "Sales" refers to efforts made in contacting and selling insurance to clients or customers who need particular coverage. "Marketing" refers to efforts made in placing an existing or prospective sale with an insurance company willing to underwrite the risk.[2]

On June 19, 1972, petitioner was hired into respondent's Kansas City office as a "sales assistant." She remained in that office until April 10, 1975 when she was terminated. The lower courts have properly recognized that petitioner's claims can best be analyzed by dividing this total period of employment into two distinct periods, namely, June 19, 1972 to November 1, 1974 and November 1, 1974 through April 10, 1975.

Between June 19, 1972 and November 1, 1974, petitioner was shifted between the positions of "sales assistant" and "marketing assistant." During this period of time, the "marketing" function in the Kansas City office was coordinated by Marketing Manager Roy Wolfe.[3] The essence of petitioner's argument before the EEOC, the District Court and the Eighth Circuit was that between June 19, 1972 and November 1, 1974 respondent discriminated

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[2]See the District Court decision, 23 F.E.P. Cases at 275, Finding of Fact 5; Petition for Writ, All.

[3]This separate Statement of the Case is provided, in part, because of petitioner's repeated claims that she did equal work to that performed by Wolfe. Though petitioner asserts that she performed "essentially parallel marketing operations" while working "alongside" Wolfe and that she was "instrumental in the development" of agency relationships (Petition for Writ, p. 4), the District Court found exactly the opposite. See 23 F.E.P. Cases at 275-76 (Finding of Fact 6) and at 277-78 (Finding of Fact 14); Petition for Writ, A16-17.

against her under Title VII and the Equal Pay Act by not paying her the same amount as Marketing Manager Wolfe. See Petition for Writ, p. 4. Petitioner's arguments relating to this time period were limited to this "equal pay for equal work" approach.

On November 1, 1974, respondent implemented a restructuring and reorganization of its corporate "marketing" function. Marketing Manager Wolfe was transferred to Dallas and took with him the majority of the responsibilities which he had assumed while working in the same Kansas City office as petitioner.[4] Wolfe's departure from the Kansas City office resulted in an opportunity for petitioner. On a probationary basis, she assumed certain marketing responsibilities which were greater than her prior responsibilities but which remained significantly less than those which Wolfe had handled prior to his transfer. Accordingly, between November 1, 1974 and April 10, 1975, the date of petitioner's termination, petitioner's performance could not be analyzed under Equal Pay Act considerations because she had no alleged male counterpart in the office and was not, in the District Court's view, a successor to Wolfe in terms of job skill, effort and responsibility.[5]

However, looking to broader principles under Title VII, the District Court next assessed the evidence relating to petitioner's rate of pay following her promotion. Relying upon evidence introduced by petitioner, the District Court found that she was regarded as a probationary replace-

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[4]See 23 F.E.P. Cases at 278, Findings of Fact 16-17; Petition for Writ, A17-19.

[5]See 23 F.E.P. Cases at 279, Finding of Fact 24; Petition for Writ, A21.

ment for Wolfe but was not paid as such.[6] Thus, though it concluded that Equal Pay Act recovery for the period of time subsequent to November 1, 1974 was not justified by the evidence, the District Court found that Title VII had been violated. Noting that damages were difficult to measure, the District Court, in a determination highly favorable to petitioner, allowed her damages on the basis of what departed Marketing Manager Wolfe had been earning.[7]

On April 10, 1975, petitioner was terminated. The District Court found that the termination was warranted and nondiscriminatory.[8]

II.

ARGUMENT

Petitioner's contention that her present claims are cognizable under the considerations governing review on certiorari set forth in Rule 17 of the Rules of this Court is refuted by the facts and the law upon which petitioner purports to rely. No issue presented by this case reveals a conflict between or among the federal courts of appeal,

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[6]See 23 F.E.P. Cases at 278-79, Findings of Fact 18-22; Petition for Writ, A19-21.

[7]Damages were difficult to measure because of the findings that petitioner's job responsibilities subsequent to November 1, 1974 were significantly less than those previously held by Wolfe. Rather than selecting some arbitrary figure between petitioner's salary and that paid to Wolfe, which figure might have been more closely related to petitioner's actual responsibilities, the District Court provided petitioner the maximum relief possible by basing damages on Wolfe's salary. Since petitioner now makes reference to a Gregory Galvin as an individual in respondent's Minneapolis office who could be compared with petitioner, it should be noted that the District Court measured petitioner's damages against Wolfe's $20,800 salary, not Galvin's $17,004 salary.

[8]See 23 F.E.P. Cases at 279-81, Findings of Fact 25-30; Petition for Writ, A21-27.

nor does any issue raise an important question of federal law which has not been, but should be, settled by this Court.

A. Petitioner's Primary Argument, That Title VII Is Broader Than the Equal Pay Act And Permits a Finding of Discrimination in Compensation Based Upon Evidence Other Than Equal Pay Act Standards, Was Acknowledged by the District Court and Confirmed by the Eighth Circuit, Consistent with the Decisions in Other Circuits, and Thus Raises No Certworthy Issue.

Petitioner's primary argument appears to be that both the District Court and the Eighth Circuit somehow have implicitly ruled that recovery under Title VII on wage discrepancy allegations is not possible unless there is co-existing recovery under the Equal Pay Act. However, an impartial reading of the two decisions confirms that petitioner's argument is just plain wrong.

The District Court did decide that petitioner was entitled to no recovery under Equal Pay Act criteria. More particularly, it found that petitioner's employment with respondent never incorporated job duties which were substantially equal to any appropriately considered male counterpart in terms of skill, effort and responsibility. The District Court's findings were comprehensive and specifically related to different periods of time, and included an express finding that between June 19, 1972 and November 1, 1974, when there was a male Marketing

Manager in respondent's Kansas City office, there was no substantial equality in skill, effort and responsibility.[9]

The District Court's denial of Title VII recovery between June 19, 1972 and November 1, 1974 was affirmed by the Eighth Circuit because petitioner had claimed and attempted to prove only that she was not given equal pay for equal work. As to that, the evidence established that petitioner did not perform "equal work" with any alleged male counterpart during this period of time. As noted by the Eighth Circuit:

> The third issue raised on appeal is the district court's failing to find that appellant was discriminated against from June 19, 1972, until November 1, 1974, under Title VII of the Civil Rights Act of 1964. Appellant argues that during this period her job duties were substantially similar to Wolfe's and that they actually performed the same work. The district court found that between June of 1972 and November of 1974 the responsibilities imposed upon and performed by appellant were substantially less than those of Wolfe and that he was paid a greater salary because his experience, training, education and job responsibilities far exceeded hers. The court's findings concerning the substantial disparity of job qualifications and responsibilities are not clearly erroneous.

Johnson v. Nordstrom-Larpenteur Agency, Inc., 623 F.2d 1279, 1281 (8th Cir. 1980) (Petition for Writ, A5).

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[9]See 23 F.E.P. Cases at 275-78, Findings of Fact 5-13 (Petition for Writ, A11-16), for the District Court's comprehensive analysis of the educational backgrounds, relevant work experience and actual job duties of petitioner and those with whom she could properly compare herself during this period of time.

Neither the District Court nor the Eighth Circuit concluded, implicitly or explicitly, that there can be no Title VII recovery for disparate compensation absent recovery under the Equal Pay Act. Rather, both courts construed the Acts together in reviewing petitioner's "equal pay for equal work" claims. For the period prior to November 1, 1974, petitioner submitted no evidence of discrimination beyond this "equal pay for equal work" approach, and thus, neither lower court had any reason to expand its review to broader Title VII concepts.

Once the evidence was expanded beyond the "equal pay for equal work" approach, relating to events after November 1, 1974, broader Title VII review in fact was undertaken. The District Court found that after November 1, 1974, petitioner's Kansas City office did not incorporate a marketing position which, under Equal Pay Act criteria, could be deemed to be a consecutively held position with that previously held by Marketing Manager Wolfe. This finding, based upon a thorough analysis of petitioner's new job as opposed to that previously held by Wolfe, properly led to the denial of recovery under the Equal Pay Act for the period November 1 ,1974 to April 10, 1975.[10]

After determining that there could be no recovery under the Equal Pay Act because there was no "equal work," the District Court turned to the broader review available under Title VII and analyzed the evidence relating to respondent's handling of petitioner's promotion. Pointing to factors such as internal memoranda generated by respondent, as well as the manner in which respondent held petitioner out in her community as a probationary replace-

[10]See 23 F.E.P. Cases at 278-79, Findings of Fact 17, 24; Petition for Writ, A18-19, 21.

ment for Marketing Manager Wolfe, the District Court found that even though Equal Pay Act criteria had not been satisfied, the discrepancy between petitioner's pay after November 1, 1974 and Marketing Manager Wolfe's pay before that date was unduly excessive and, at least in part, attributable to her sex.[11] The District Court concluded that Title VII had been violated for the period from November 1, 1974 to April 10, 1975.[12]

In support of her contention that this matter is certworthy under considerations set forth in Rule 17(a) of the Rules of this Court, petitioner erroneously asserts that the circuit courts of appeal are in conflict on the issue supposedly presented here, i.e., the relationship between Title VII and the Equal Pay Act concerning allegations of discriminatory compensation practices. Even if this issue were presented by the lower court's decisions here, which, as noted above, it is not, the alleged "conflict" does not exist.

Petitioner claims that the Fifth, Eighth and Tenth Circuit Courts of Appeal have differed from the Third and Ninth Circuits. Citing *I.U.E. v. Westinghouse Electric Corp.*, 23 F.E.P. Cases 588 (3d Cir. 1980), and *Gunther v. County of Washington*, 602 F.2d 882 (9th Cir. 1979), *rehearing denied*, 22 F.E.P. Cases 1650 (1980), she argues that the Third and Ninth Circuits have read Title VII to provide broader opportunities for relief than the Equal Pay Act on the issue of discriminatory compensation. In an effort to establish a conflict among the circuits, petitioner then erroneously contends that the Fifth, Eighth

[11]See 23 F.E.P. Cases at 278-79, Findings of Fact 18-22; Petition for Writ, A19-21.

[12]See 23 F.E.P. Cass at 283, Conclusion of Law 4; Petition for Writ, A32.

and Tenth Circuits limit Title VII recovery for discriminatory compensation to those situations where recovery is allowable under the Equal Pay Act. However, looking at the very cases upon which petitioner relies, it becomes quickly apparent that there exists no conflict among the circuits concerning the interrelationship of the Equal Pay Act and Title VII. Petitioner is comparing apples with oranges.

In *Gunther v. County of Washington, supra,* the Ninth Circuit was confronted with claims which were broader than mere claims of denial of equal pay for equal work. The claim in *Gunther* was that even if the work were not substantially equal, there should have been an opportunity to prove that wage discrepancies were at least partially attributable to sex discrimination. This is precisely what the District Court allowed in the instant case. As to any alleged conflict among the circuits, the *Gunther* decision clearly distinguishes the considerations present there from those present in the decisions of other circuits. In referring to decisions rendered by the Fifth and Eighth Circuits, the Ninth Circuit stated:

> The cases considering the relationship between Title VII and the Equal Pay Act have involved claims that females were being denied equal pay for equal work. *See, e.g., DiSalvo,* 568 F.2d 593; *Orr v. MacNeill,* 5 Cir., 511 F.2d 166. Quite properly, these cases have construed the two statutes harmoniously; any other approach may have produced different results depending on whether a plaintiff labeled his cause of action as being brought under "Title VII" or under the "Equal Pay Act."[13]

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[13]The *DiSalvo* decision is cited more fully as *DiSalvo v. Chamber of Commerce of Greater Kansas City,* 568 F.2d 593 (8th Cir. 1978). The *Orr* decision is more fully cited as *Orr v. Frank R. MacNeill & Son, Inc.,* 511 F.2d 166 (5th Cir.), *cert. denied,* 423 U.S. 865 (1975).

Gunther v. County of Washington, 602 F.2d at 888.

Petitioner's "apples and oranges" comparison is further exposed by *Gunther's* reference to the trial court's decision in *I.U.E. v. Westinghouse Electric Corp.*, 19 F.E.P. Cases 450 (D.N.J. 1979) (reversed by the Ninth Circuit and discussed below). The *Gunther* court commented as follows:

> The general rule stated in the cases cited in *IUE*—that Title VII equal pay claims should be judged under Equal Pay standards—is compatible with the view we have taken. Those cases, however, did not consider the issue whether Title VII prohibits conduct outside the scope of the Equal Pay Act, and we see no reason to extend the rationale of those cases to a significantly different issue which they did not address.

Gunther v. County of Washington, 602 F.2d at 891.

The second decision relied upon by petitioner, *I.U.E. v. Westinghouse Electric Corp.*, 23 F.E.P. Cases 588 (3d Cir. 1980), likewise confirms that there is no conflict among the circuits on the issue of whether Title VII can be deemed to provide broader opportunity for relief than the Equal Pay Act. There the Third Circuit, in considering this issue, concluded that except for *Gunther*, other circuit and district court decisions were not helpful because they did not decide the same issue. *I.U.E. v. Westinghouse Electric Corp.*, 23 F.E.P. Cases at 598. The very cases cited by the Third Circuit as not deciding the same issue[14] include some of the cases erroneously relied

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[14] *DiSalvo v. Chamber of Commerce of Greater Kansas City*, 568 F.2d 593, 596 (8th Cir. 1978); *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 446 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978); *Man-*

upon by petitioner here in her effort to create a conflict where none exists.

Supreme Court Rule 17(a) provides that an issue might be deemed certworthy if a federal circuit court has rendered a decision in conflict with a decision of another circuit court *on the same matter*. Here petitioner has pulled issues out of *Gunther* and *I.U.E.* which do not exist in the decisions petitioner claims are in conflict. There of course is nothing certworthy about different circuit courts, or for that matter the same circuit court, reaching different results on different issues.

In addition to alleging that a conflict exists among the circuits, petitioner argues that the Eighth Circuit in the instant case implicitly decided that recovery under Title VII is not possible absent recovery under the Equal Pay Act. Again, there is no such finding. The Eighth Circuit simply held, as it should have, that the District Court's detailed findings were not clearly erroneous. It decided no important question of federal law which has not been, but should be, decided by this Court, as contemplated by Rule 17(c). The District Court found that Title VII and the Equal Pay Act should be construed harmoniously with respect to "equal pay for equal work" claims, but that Title VII allows recovery even without findings of equal work if wage discrepancies are due, at least in part, to considerations of sex. The Eighth Circuit affirmed these findings under the proper standard of review. No important legal issue remains to be settled.

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hart v. City of Los Angeles Dept. of Power & Water, 553 F.2d 581, 587-88 (9th Cir. 1976), *aff'd in part and rev'd in part on other grounds*, 435 U.S. 702 (1978); *Orr v. Frank R. MacNeill & Son, Inc.*, 511 F.2d 166, 171 (5th Cir.), *cert. denied*, 423 U.S. 865 (1975).

B. Petitoner's Argument Concerning the Proper "Establishment" for Equal Pay Act Application Is a Pure Fact Argument Which Involves No Important Question of Federal Law, and Thus Raises No Certworthy Issue.

Petitioner asserts that the determination of what properly constitutes a separate "establishment" for purposes of Equal Pay Act application is an important question of federal law which has not been, but should be, decided by this Court. However, there is no attempt to show that the uniformly acknowledged criteria for "establishment" analysis are in any way under attack or at issue here. Instead, petitioner simply contends that these criteria, when applied to petitioner's version of the facts, should have caused the District Court to conclude that respondent's nationwide system of separate and autonomous offices nevertheless is a single "establishment." This presents no certworthy issue of law, but rather is pure fact argument.

The case law cited by petitioner emphasizes that centralization of administrative processes, interchange of employees and use of the same premises are, among others, factors to be addressed in determining what constitutes a separate "establishment."[15] We do not quarrel with these factors, but we do emphasize that they are to be applied to the particular circumstances of each case. Petitioner has cited a few cases which found, upon application of the proper criteria, that the "establishment" included more than one location. In the instant case, however, application of these criteria resulted in a determination that re-

[15]See Petition for Writ, pp. 21-23.

spondent's Kansas City office is a separate "establishment."[16]

There is no important question of federal law here at all, let alone one which has not been, but should be, decided by this Court. Petitioner's fact arguments already have been determined below.

C. Petitioner's Recurring Demand for Recovery of Costs Raises No Certworthy Issue.

Petitioner's final argument is that an important question of federal law has been created by the Eighth Circuit's determination that the District Court's denial of costs in this action was not an abuse of discretion. *Johnson v. Nordstrom-Larpenteur Agency, Inc.*, 623 F.2d at 1282. Though labeled as an important question of federal law, this is but another request for review of the facts relevant to the District Court's discretionary denial of out-of-pocket costs to both sides.[17]

A trial court has broad discretion in taxing costs where each of the parties has prevailed on one or more of its claims, defenses or counterclaims. *Cornwell Quality Tools Co. v. C.T.S. Co.*, 446 F.2d 825, 833 (9th Cir. 1971), *cert. denied*, 404 U.S. 1049 (1972). This law was specifically acknowledged by the Eighth Circuit here. *Johnson v. Nordstrom-Larpenteur Agency, Inc.*, 623 F.2d 1279, 1282 (8th Cir. 1980).

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[16]See 23 F.E.P. Cases at 279, Finding of Fact 23; Petition for Writ, A21.

[17]Note that the Eighth Circuit did remand the issue of attorneys' fees to the District Court for determination, on the theory that plaintiff could be deemed to have prevailed partially on her claims. Respondent has not sought review by this Court of that decision, though we believe the District Court quite properly denied petitioner's claim for fees. Thus, the only matter now at issue is petitioner's claim for other miscellaneous costs of litigation.

Petitioner does not ask this Court to consider whether the "abuse of discretion" standard is unduly broad when applied to the goals and remedial purposes of Title VII, but rather simply quotes general authority on the costs issue and urges this Court to reach a different determination on the facts. Petitioner's request does not raise a certworthy question.

III.

CONCLUSION

The petition should be denied because none of the questions presented is certworthy.

Dated: November 14, 1980.

Respectfully submitted,

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